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Extraordinary Justice

S Rangarajan

Writings and Essays

Foreword by M.N. Venkatachaliah
(*former Chief Justice of India*)

Edited by Sanjay Parikh

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Dedicated to

Nappinnai Rangarajan

Justice S Rangarajan

Justice S. Rangarajan (Rangarajan, Seshe Iyengar) was born on 9.9.1916. He was educated at National School, Tiruchirappalli and National College, Tiruchirappalli. He received his Master's Degree in Constitutional and International Law from Madras University and enrolled as an Advocate at Madras High Court on 4.4.1938. He was appointed District and Sessions Judge in October, 1952. Thereafter he served as Director of Legal Studies under the Government of Madras from July, 1962 till he was once again asked to function as District and Sessions Judge from January, 1967. On 20th August, 1969 he was elevated as a permanent Judge of the Delhi High Court.

It was while he was in the Delhi High Court that Justice Rangarajan, during the Emergency, dared to quash Emergency detentions. The most famous of the detenues released was, of course, the distinguished journalist, Mr. Kuldip Nayar. As punishment, Justice Rangarajan was transferred to the Gauhati High Court on 22.6.1976. He was retransferred as Judge, Delhi High Court on 18.07.1977. He served as Chairman of Monopolies and Restrictive Trade Practices Commission from 24.2.1978 to 8.9.1981. After his retirement, he started practice as a Senior Advocate in the Supreme Court. In 1988, Justice Rangarajan left Delhi to settle down in the village of Parali near Tiruchirappalli. He breathed his last there on 3.9.2001, leaving behind his wife, Nappinnai and two sons, R.Srinivas and Anand.

Nappinnai Rangarajan, a simple and compassionate person still active despite her years, continues to live in Parali where she spends her time looking after the concerns of the village folk and doing organic farming.

Editor's note and acknowledgements

I think I owe a duty to write why this effort has been made. There are basically two reasons: Justice Rangarajan had left all his writings with me and for a long time I was not certain what I should do with them. It occurred to me that what Justice Rangarajan wrote and his ideas on various subjects should not be confined to me alone; others should know what someone like him had contributed to the eternal stream of ideas and concepts. The second reason, I suppose, was an answer to my conscience, which of course, was executed without any outer compulsion or obligation.

Essentially: fundamental ideas never get old; they perish and revive with the changing times. I am aware that in the legal and economic sphere, drastic changes have taken place in the last decade, but some of the basic issues and problems still remain the same.

It took me a long time to collect and sift through the various articles, speeches and other writings of Justice S. Rangarajan for the purpose of inclusion in this book (*for a full list, see the bibliography*). As I said above, his writings on some specific subjects of law had become dated and needed many changes, like the addition of footnotes, etc. Since I had decided not to tinker with the originals, those writings were, therefore, excluded. The same rule was applied to the bulk of his writings on anti-trust law and role of public corporations. I was thus left only with those articles that deal either with basic philosophy on specific legal issues or that depict the multifaceted aspects of his personality. Corrections and editing have been done to maintain continuity in the ideas without distorting in any manner the original text, whether it was a speech or an article. Sentences that

were too long and were posing problems in reading, have been made readable by inserting the necessary punctuation.

Leena Taneja Rao, Claude Alvares and Norma Alvares (Other India Press) made ceaseless efforts to ensure that the text is free from typographical errors. But for OIP fixing a time schedule for me to do the needful, I don't think I could have taken up this challenge. I am extremely grateful to all of them..

My gratitude goes to Justice M.N. Venkatachaliah who not only agreed to write the foreword to this book but guided me in accomplishing my aim—cherishing the memory of Justice Rangarajan. My profound thanks to Justice V.R. Krishna Iyer and P.P. Rao, Senior Advocate, who gave me their memoirs of Justice Rangarajan almost immediately after my request. Chaturvedi Badrinath, an intimate friend of Justice Rangarajan, in his tribute, has touched on delicate and sublime aspects of Justice Rangarajan's personality. I deeply appreciate these contributions. I got all support and encouragement from Vatsala and R. Srinivasan, Justice Rangarajan's daughter-in-law and son, as well as from his cousin—R. Desikan. I have no words adequate enough to describe what Ammaji (Mrs. Rangarajan) means to me: she has been a constant source of inspiration. The book has been dedicated to her. I will be failing in my duty if I do not remember my father Mr. S.B. Parikh, and Vandana, my wife, who not only cleared my doubts but gave valuable suggestions at every step.

Sanjay Parikh

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Foreword

M. N. Venkatachaliah

THERE IS HARDLY any justification for any extraneous foreword to *Extraordinary Justice*—a collection of writings by and on Justice Rangarajan. The life and work of Justice Rangarajan have received wide adulation. The touching tributes by Justice Krishna Iyer, P.P. Rao, Chaturvedi Badrinath and Sanjay Parikh in this volume give us a glimpse of the multifaceted personality that Justice Rangarajan was.

The fame of Justice Rangarajan does not rest merely on his judgement in the Bharti Nayar case, though in those tumultuous times fear and apprehension stalked even brave hearts and the relevance and utility of every institution including judicial institutions came under challenge of reassessment. Justice Rangarajan stood out like a 'mountain peak that dazzles in the last rays of the setting sun'.

His claims to a permanent place in the legal world rest equally on his scholarship, erudition and the courage of conviction. He was a scholar, savant, connoisseur of classical music, a fearless and upright judge and more than all a warm and gracious human being.

I came to know him during his days at the Bar after his retirement. The range of his interests covered a very wide spectrum—from the esoterics of Gayathri Manthra to the nutritional content of boiled potato peel. His engagement with life

was not an entrapment in the thralldom of the world. He had an elevated sense of purpose, which transcended the mundane concerns of ordinary life.

Justice Rangarajan's own writings contained in this volume show the lawyer, the scholar and the man that he was.

This volume, I do hope, will serve to sustain a continued interest in the life and work of this extraordinary judge.

Bangalore, August 11, 2004

Reflections

Sanjay Parikh

I RECENTLY FINISHED reading Saint-Exupery's book, *Wind, Sand and Stars* in which he narrates his experiences as an airman. The narratives are not mere experiences of the desert, sea, snow and the mountains, but of how people in those environments and circumstances encounter their joys and sorrows, relate to their own selves and to their fellow beings and attempt to make some mark on the canvas of time.

Saint-Exupery concludes the book with a profound statement: 'Only the spirit, if it breathes upon the clay, can create a man.'

The journey of life is not mere recognition of places and events, but significantly how it touches oneself in this great interplay of ups and downs. You start like clay and try to impress upon it, with each step forward, a fraction of an unfathomable treasure of fragrance. The bad experiences do not deter you on the journey. You meet in people the vastness of the sky, the depth of the sea, the beauty of the mountains or sometimes the harshness of a rock. These experiences make you a man. It is in this manner that I look on my encounters with people and places. Turning back, I see a clear line where one can walk without any confusion. A way of seeing does change the perception!

I stood by his abode, like an unchartered ship, drawn by the forces of nature and destiny. Though the captain of the ship was quite happy with the new discoveries he made every day, the man at the harbour was worried. He observed that this unchar-

tered journey could at some point of time prove to be tiring and then there would be very little time left to look back. He was trying to fasten an anchor, an anchor of care, concern and affection. I hesitated for a while, but ultimately succumbed. In the anchoring, there was no bondage, though the space was different. With the withering away of the clouds, more and more of the sun's rays were penetrating the mind, new experiences were carving their pictures on untouched horizons. In that assurance, I travelled long distances in understanding the beauty of human relationships. The clay was changing moulds to achieve a shape that nature had already thought of.

This is how I look at my relationship with Justice S. Rangarajan. It is very difficult to write about a person to whom you were (and in a sense continue to be) emotionally attached. Much more so, when you integrate that person's values with your own actions. It becomes virtually like seeing yourself in a mirror. In tracing the memories of such a person, you visit again and again your own self. How then can one write of this, unless there is a compulsion. But in compulsion one misses a lot; one regrets later the inadequacies of expression.

Despite all these apprehensions, however, and apologetic in advance, I have dared to write. Those who knew Justice Rangarajan as a friend, as a philosopher, as a musician, as a judge or as a simple human being may still question me or differ in their analysis of him, but as I said above, my perception is from a different angle.

I met Justice Rangarajan for the first time towards the end of November 1982. I was a young man who was not able to reconcile the vast disparities in human lives, the sheer madness of ambitions and selfish actions. I think now that it was not a mere coincidence, but an indication of what was awaiting me: when I saw him face to face, I saw a glimpse of J. Krishnamurthy, who had considerably influenced my thinking by then. He had the same wheatish complexion, long face, big eyes and heavy eyelids. This is how destiny assured me I had reached a point at

which a turning for a further journey had to take place. No more unchartered discoveries! Life is full of such coincidences and contradictions.

After my acquaintance with Justice Rangarajan grew, the first thing he told me was about how the death of his father at an early age had been a blessing in disguise. I was shocked—how could a father's death be a blessing? He explained patiently how this event brought him under the care and guidance of his maternal grandfather—a great vedantin, yogi, sanskritist and jurist—who changed his total perception of life. His exposure to the highest spiritual knowledge, even as a child, helped him to have an integral view of life.

One day in the discussions, I could not restrain myself from referring to J. Krishnamurthy and his idea of looking at things without any preconceived notions, as something new and fresh. He said that he had had a dialogue with J. Krishnamurthy once, but had not been satisfied with some of his explanations. So what I had glimpsed was different perhaps. His response did not bother me, however.

I have discovered a great wisdom in that idea. In our day-to-day life or in human relationships, we develop notions—following our own understanding—about a person, and we always see him or her thereafter, coloured as it were, with that vision. Often, what has been taught to us becomes a dogma, our way of life, and restrains us from the journey of exploring new vistas of consciousness. Though Justice Rangarajan expressed his disagreement, when I look back, I find that he was a living embodiment of that idea and that it was reflected in his relationships with everyone he met—no hang-ups and no malice. Although he was persecuted during Mrs Indira Gandhi's Emergency for quashing many detention orders, among others, that of Kuldip Nayar, he wrote a very touching tribute to her, when she passed away, in *The Call Beyond*, (a journal published by the Sri Aurobindo Ashram, Delhi Branch). I once asked him how he had felt when he was transferred to Gauhati during the Emer-

gency. He calmly replied: 'I never felt humiliated or belittled by those factors. I was happily discharging my duties as a judge of the Gauhati High Court, taking it as my *dharma*—to do justice in all circumstances.'

Justice Rangarajan took his master's degree in Constitutional and International Law and enrolled as an advocate with the Madras High Court in 1938. He became a district and sessions judge in 1952, and was elevated as a permanent judge of the Delhi High Court in August 1969. He was transferred to Gauhati High Court in June 1976 during the Emergency and re-transferred to the Delhi High Court in July 1977. Finally, from February 1978 to September 1981, he served as Chairman of the Monopolies and Restrictive Trade Practices (MRTP) Commission. This brief career sketch can never convey the qualities of the person, much less explain with what aim he lived those milestones, and what he actually did to pursue those aims. Even when he was relieved from these trappings, there was no discontinuity in the life-flux—it flowed on with the same happiness and enthusiasm: it was only the background that had changed. He was like that—untouched by power or position.

After his retirement as a judge, he took a house on rent in Sarvodaya Enclave, south Delhi. One day, all of a sudden, the landlord asked him to vacate the premises. He decided to quit the place as early as possible. The founder of the Sri Aurobindo Ashram (Delhi branch), the late Sri Surendra Nath Jauhar, (fondly called *Chachaji* by us), who had developed a great admiration for Justice Rangarajan's knowledge and understanding of Sri Aurobindo's works, came to know of his decision to leave the rented place (Sarvodaya Enclave is in the vicinity of Sri Aurobindo Ashram) and shift to a distant area. Early one morning, Sri Jauhar visited him, virtually commanded him not to go any place else, and persuaded him to shift instead to the Ashram. Sri Jauhar also sent him a bullock cart and lots of people to shift the books and household goods to a small place inside the Ashram.

Thus, a new chapter began. I was benefited now in abundance by the presence of two giants. Sri Jauhar first appeared to be a little tough, but I soon came to experience the softness, compassion and concern for others hidden behind his tough exterior. He also had a keen interest in finding out the qualities of every person—which he always respected. I had the great fortune of sitting in the company of Justice Rangarajan, *Chachaji*, Dr. D.S. Kothari (great educationist and scientist), Justice Shiv Dayal (retired Chief Justice of Madhya Pradesh High Court) and others and listening to them for hours. Besides serious matters, there would be jokes, laughter and the delightful and soul elevating music of Karunamayee.

Once, I remember *Chachaji* trying to pull Justice Rangarajan's leg by asking him why he wasted his time in court. He even suggested that if he had plucked the grass from the Ashram's lawn, that would have done him more good in his *sadhana* than the liar's job! We all had a hearty laugh.

While at the Ashram, Justice Rangarajan took up the responsibility of editing *The Call Beyond.* (Karunamayee was editing the Hindi magazine *Karmadhara.)* I started contributing poems to both *Karmadhara* and *The Call Beyond.* Sri Jauhar liked one of these poems so much, he asked me to become a joint editor of both *The Call Beyond* and *Karmadhara.* Those were indeed the days of harmony and enrichment from every angle. The grace of Sri Aurobindo and the Mother was evident everywhere. Justice Rangarajan, his wife and I became a part of the Ashram.

I remember an incident worth mentioning. Justice Rangarajan and his wife had been given two ordinary rooms (without any drawing or dining room) and a kitchen and a bathroom, which were part of the two rooms. He gladly accepted staying there. The two rooms—which were on the first floor—had a roof that leaked, something we discovered only in the rainy season. Once there was a heavy downpour in the night. When I went upstairs early the next morning (by this time, I

had also found a small room to stay in the Ashram) to have coffee as usual, I was surprised to find both of them sitting on their cot surrounded on all sides by rainwater dripping from the leaking roof. Both of them looked at me and smiled and Justice Rangarajan said: 'For the whole night, we have been enjoying the rain inside!' Before I could say anything, Justice Rangarajan had already started joking and he made us all laugh. The momentary seriousness withered away. But I still find the episode meaningful: problems that often disturb us are worth laughing at.

What then was the nature of my relationship with Justice Rangarajan: a senior (in the present day terminology), a guru, a mentor? I think it was beyond all these categories and the respective meanings assigned to them. It was not for seeking a place in the legal community or for finding a source of livelihood, or building a career that I had accepted to be with him. One had a clear understanding even at that time that posts, positions and money have a limited role to play, and these attributes can neither be the basis of life's truth nor the source of its enrichment. What should, therefore, be the way of life was a big question. Justice Rangarajan knew that, unlike others, I was not trying to understand law for the sole purpose of seeking a means of livelihood. He, therefore, described my stay with him as a *gurukulwasa*; law was part of a broader framework. There were questions and answers, disagreements and provocations. Something which was stagnating, wanted to flow. Words were no consolation; it wanted to see them in action. When, on the superficial level, a rigorous training in law was going on, consuming days, months and years, somewhere inside I was finding the untidy threads coming closer to weave an object. Gradually, an interrelationship was developing with the objects outside: a harmony between nature and the spirit.

It was during this period that Justice Rangarajan gave me Sri Aurobindo's *Synthesis of Yoga* to read. I found my percep-

tions reflected in the book: that *bhakti, karma* and *gyan* do not exist separately, to be practised in separate phases of life but, that in fact, they move together to give meaning to life. It is in the relationship of human beings, in their interaction with each other, with matter and, at the same time, in seeing their divine presence, that a new way of looking at things arises. The new *drishti* takes you further on your journey.

I do not know whether all my questions were answered. But I can certainly say there was discovery of a new joy. I was looking at a brighter picture of the self. I did not know what was going on inside Justice Rangarajan's mind. But his plans became clear when I overheard him telling my father: 'Your fears are over. I assure you that he will continue in the profession. He has now become a *sansari*.' A statement like that would have shocked any other person who was taking him seriously all this time, but for me, I was amused. It was never disclosed to him that I knew of his conspiracy against me. I understood that he did not use the expression *'sansari'* with its ordinary meaning, that is, a person immersed in his selfish pursuits, away from his journey of self-enrichment. Being a true Aurobindonian, he wanted the divine touch in matter, in life and in all day-to-day actions—not running away. He had practised those principles in his own life. His sense of detachment never brought any slackness in his actions. He would do even a worthless job assigned to him with dignity and perfection.

I will fail in my duty if I do not mention Justice Rangarajan's great interest in economics and its nuances. He had read the communist philosophy of economic development thoroughly . He was, however, convinced that the idea of economic liberalism was necessary for development. Somewhere he wrote, 'We need to be involved with the global business and cannot isolate ourselves; yet we have to fight against the hangover of colonialism, without submitting to a neocolonialism. This is an area which calls for the higher kind of skills.'

His philosophy of 'adversities turning into blessings' also proved correct when he was transferred to Gauhati. He spent a lot of time reading about law and its interrelationship with economics—what he had begun to describe as *lego-economics*. Often, he used to say that the knowledge of economics is indispensable both for a lawyer and a judge, as both encounter various socioeconomic problems in modern litigation. (This statement is even truer today when decisions of the WTO have global impacts, more so on developing countries, affecting different aspects of human life in them, including the legal rights of their people, food security, public health, environment, etc.) Justice Rangarajan wrote profusely on subjects like the structure and legal control of public sector enterprises in India, about economic challenges to democracy, etc. He also made comparative studies of antitrust laws and the role of multinational corporations.

He was very fond of quoting Wittgenstein and Erich Fromm. One of the more famous sayings of Wittgenstein that he related to me was that 'he did not solve philosophical problems, he dissolved them,' and that his aim was 'to show the fly the way out of the fly bottle.' But I found him transgressing Wittgenstein's maxims in my case: he wanted to be sure—and not merely show—the fly knew its way out of the fly bottle!

He was a great judge, a scholar, a musician, a philosopher and, beyond all this, a person with a deep urge to transcend one's limitations as a human being. This process of understanding himself had made him compassionate, large-hearted, selfless, always ready to see the goodness in others. With childlike innocence, he trusted everybody. His attachment to materialistic pursuits was practically nil. About his own writings, he told me a few years back, 'They are all trash, and if I have time I would like to correct so many errors which have occurred in them.' He had the courage to question his own conclusions, his own convictions, and that made him vibrant and always full of enthusiasm and energy.

I noticed in his later years that though he had developed a flourishing practice as a senior advocate, he looked increasingly disenchanted. It may be that he wanted to spend more time with himself and with his *veena*. Music was closest to his heart.

Despite this, I was still taken aback when he told me around the end of 1997 that he had decided to shift to a village near Trichy. I felt extremely pained at the prospect of his departure, but he consoled me, promising that he would keep on coming to Delhi and would remain in constant touch.

He left Delhi in the early part of 1998, but fulfilled his promise of frequently visiting the city on some pretext or the other. Later, when he found it difficult to travel, he would entice me to his village by creating all kinds of situations that compelled me to get there. Those who knew him and wished to benefit from his immense knowledge and legal experience, would chase him even to the village. We had, therefore, many professional discussions in the green, serene surroundings of his village home.

Even in the village, he remained constantly in touch with the latest developments in the fields of law and economics. I would send him articles and books on some of the latest issues. He even installed a computer, along with an internet connection, in his new home, to prove that he was not lagging behind. He would use it only for a short time. I remember receiving his first e-mail informing me that he was now abreast with the latest computer technology.

Justice Rangarajan read a lot of literature and poetry, but was more fond of prose. When he read one of my poems in *The Call Beyond*, he immediately responded in his provocative style: 'You in the north indulge too much in romanticism.' The poem was on the theme of Radha's love for Krishna. I just laughed. It is only after his passing, that Mrs. Rangarajan showed me a poem that he himself had written at the age of 80. The poem—which is the only one he wrote in his lifetime—has a mystic touch and

a deep aspiration. His search within the ambience of coconut trees had found a new dimension. He was finding more of his own self in such creations.

In the village, he would wait for my arrival, sitting outside and worrying if I were late. He would not permit me to amble inside the village on my own, fearing I would lose my way, despite the fact that there was only one small road.

I miss his conversations, his concern, and his affection. But in the silent moments, someone assures me, 'You are not alone,' and on the path of time, I see a rich harvest enough for this life.

If he was near to me then, he is nearer now.

A Great Human Being

Justice V.R. Krishna Iyer

RANGARAJAN AND I were classmates and close friends from 1935 onwards. He was a brilliant student and legal erudition and lawyerly tradition were in his blood. He was a successful lawyer in Tiruchirapalli, even as I was at Tellicherry. I was a member of the Madras Legislative Assembly when Rangarajan, giving up his flourishing practice, agreed to become a District and Sessions Judge in October 1952. He was a great teacher as Director of Legal Studies, and I had boundless admiration for his scholarship. Later, we spent much time together in Delhi. He was a judge of the Delhi High Court and I was a member of the Law Commission. Eventually, I was elevated to the Supreme Court and preserved my close association with Justice Rangarajan.

He was great in many senses. As a music lover, musicologist and veena player, he displayed excellence beyond the attainments of a professional. I remember his correcting the flute maestro Mahalingam, when the latter was giving a flute recital at my residence and Rangarajan was sitting next to me. He was a profound exponent of Karnatic music, even as he was a remarkable jurist with creative capabilities. As a judge, he displayed amazing learning on the Bench. His independence as a judge was a paradigm for the entire judicial brotherhood of India. During the dark days of the Emergency, he held aloft the torch of liberty and released Kuldip Nayar, the famous journalist, vindicating the freedoms inscribed in our Constitution. For this functional daring he was transferred from Delhi to Assam,

which shocked me. I complained about this outrageous assault on judicial independence to Sri. H. R. Gokhale, the then Law Minister of India, but in vain. On retirement, he set up practice as senior advocate in the Supreme Court, and argued cases with matchless clarity, based on constitutional fundamentals. I remember Justice Chandrachud once telling me how astonishing his scholarly submission in Court was, in the Auroville Case where the philosophy of Sri Aurobindo had to be dealt with.

He was not merely a rare advocate, but a model of simplicity in life. His lifestyle was such that he transformed himself into an ascetic with a vision. Hardly anyone in his days had imbibed the Aurobindo philosophy as much as Rangarajan. More than that was his practice of eliminating 'self' from his thought processes. He was selfless in a dimension where it would be difficult to find a parallel. He would lecture us on giving up the idea of self and demonstrate it through his own example. His courage on the Bench could be traced to this spiritual detachment. He narrowly missed becoming a judge of the Supreme Court, but was made Chairman of the Monopolies and Restrictive Trade Practices Commission, where he shone as a fearless controller of business morality. Public Interest Litigation and Legal Aid to the poor were part of his passion, and we were on the same wavelength in many matters. Our lifelong friendship is something which I cherish. His luminous learning will always be remembered. His selfless commitment to the glorious values of our Constitution and culture are an inspiration for the present generation of the legal fraternity, including the Bench, the Bar and the law teachers.

My son Paramesh had joined the Bar at Ernakulam, in the Chambers of Mr. Sivaraman Nair (who later became a judge). Rangarajan being so close to me, gave Paramesh the paternal advice that he should come away to Delhi to practise. 'I will put you under a senior in Delhi and your career will be bright. Be in the mainstream, not in the backwaters.' Paramesh shifted his practice to Delhi at the instance of Rangarajan. However, it so happened that later Paramesh became a business executive.

Mrs. Rangarajan, like her husband, is purity and austerity personified. I have rarely seen such a fine couple. They moved into an *ashram*, led a life of self-abnegation and blended temporal contentment with spiritual fulfillment. Incomparable!

An Ideal Judge

P.P. Rao

I FIRST HEARD of Justice S. Rangarajan, then a district judge, when he was appointed Director of Legal Studies, Madras, in 1962. I was a member of the Faculty of Law, University of Delhi. Justice Rangarajan had an academic bent of mind. He had obtained a Master's Degree in Constitutional Law and International Law from Madras University and was interested in the development and growth of law. He had no difficulty in switching over from the judicial to the academic world and vice versa. He made a deep impression on the academic world during his five-year term as the Director. He was directly recruited as a district judge in 1952, and it was a matter of great satisfaction to him that he was selected and appointed as a district and sessions judge by the government of Madras headed by C. Rajagopalachari, one of the ablest administrators the country has seen.

Having lost his father at an early age, Rangarajanwas brought up by his maternal grandfather, a leading lawyer of Trichy, and a scholar of Sanskrit and Vedanta. Growing up as a member of a successful lawyer's family tends to promote an aptitude for the legal profession and his grandfather must have been a role model. Rangarajan had wide-ranging interests apart from law. He was fond of literature, ancient and modern, and classical music. He used to play the *veena*. He was lucky in having an enlightened spouse who shared his interests and they appeared to have been made for each other. He was a prolific reader and a man of

immense learning. In January 1967, he went back as district and sessions judge, and functioned as such till his appointment as a permanent judge of the Delhi High Court in 1969. Although his legitimate expectations of being elevated to the High Court of Madras did not materialise, he accepted the new assignment as God's will.

The Delhi High Court is a unique High Court, perhaps the most important High Court in the country, because of its location in the capital of India—which happens to be the seat of the central government, Parliament and the Supreme Court of India. Leading lawyers practising in the Supreme Court and, in particular, the law officers of the Government of India appear in the Delhi High Court frequently. The judges of the Delhi High Court receive the assistance of eminent lawyers almost every day. As Chief Justice M.C. Chagla used to say, the quality of judgments depends, to a large extent, on the quality of assistance given by the lawyers who appear in the cases. The Delhi High Court, from its inception, had the advantage of having a significant component of competent judges from outside. Justice K.S. Hegde, who was the first Chief Justice of the Delhi High Court, was an outstanding judge from the state of Karnataka. In his team he had Justice T.V.S. Tatachari, who had practised for many years in the High Court of Madras and in the Supreme Court. That was long before the policy of transfer of judges was evolved. The Delhi High Court continues to be a cosmopolitan High Court in every sense. The Bar of the Delhi High Court welcomes with open arms good judges from any part of the country. The friendly atmosphere here makes one feel at home, whether one is on the Bench or at the Bar. Justice Rangarajan was destined to make a mark as a judge of the Delhi High Court.

The Delhi High Court used to have a Circuit Bench at Shimla. I vividly remember my first appearance in 1969 before Justice S. Rangarajan (sitting singly). It was in a service matter on behalf of an ophthalmologist who was a member of the central government's health services. I was deeply impressed by the

judge's court manners, his transparency, scholarship and earnestness to do justice. He was very understanding, very gentle and courteous to members of the Bar—irrespective of their standing. He would guide younger members of the Bar and help them to put across their cases properly. He was liked immensely by the Bar. I developed a great admiration for the man who functioned as an ideal judge. In due course,my association with him developed into friendship.

Judgeship is not a bed of roses, particularly during troubled times. Justice Rangarajan, sitting with Justice R.N. Aggarwal, heard the habeas corpus petition filed by Mrs. Bharti Nayar, challenging the detention of her distinguished husband Mr. Kuldip Nayar, a prominent journalist, under the Maintenance of Internal Security Act, 1971. The petitioner was represented byV.M. Tarkunde andSoli J. Sorabjee, two champions of civil liberties. The Union of Indiawas represented byP.P. Khambatte, Senior Advocate, andA.B. Saharya, central government counsel. The hearing of the case commenced on 1 September 1975, and the judgment was reserved on 10 September. By then, it was clear to one and all that the impugned order was going to be quashed. Tarkunde suggested at the conclusion of the hearing that, in the event of the court agreeing with his submissions, the court could straightaway orally direct revocation of the detention order and release of the *detenu* and record the reasons in the judgment later. The court observed that the judgment would be delivered soon. On 12 September, the court directed the case to be listed for pronouncement ofjudgment on 15 September. Before the court rose for lunch, the government counsel, mentioned to the court that the order of detention had been revoked and Kuldip Nayar had been released. The court informed him that it had already directed listing of the case for pronouncement ofjudgment on 15 September, and that the action taken was in tune with the judgment proposed to be delivered.

On 15 September, an application was filed on behalf of the government, enclosing a copy of the revocation order dated 11/

12 September 1975 and praying that the same might be placed on record and suitable orders passed thereon. It appeared to be a move to preempt the pronouncement of the judgment, which might cause embarrassment to the government, with wide repercussions on other similar cases pending in various High Courts. The court had two options before it—either to deliver the judgment as shown in the cause list, or to dismiss the habeas corpus petition as infructuous, in view of the order of revocation of detention. The court decided to pronounce the judgment, incorporating the reasons for this action in the judgment itself as a postscript which reads:

> In being persuaded to pronounce the judgment prepared by us even before we knew about this kind of action by the respondents, we are pressed by the consideration that in the public law area, which is what any matter pertaining to the issue of a writ of *habeas corpus* under Article 226 of the Constitution is, we are unable to visualise any compromise as such between the parties (it is not so here in fact) even without reference to court especially after the issue of a *rule nisi*, which requires to be discharged by the court. In this view, the judgment which was prepared by us, as explained above, has been pronounced and is signed by us, subject, however, to our recording the fact that an order quashing and giving direction to release the detenu has become unnecessary in these circumstances. The *rule nisi* is discharged.

The judgment received wide coverage, and became a landmark in the history of the independence of the judiciary during the Emergency, when the central government was all powerful. The government reacted unfairly by transferring Justice Rangarajan to the Gauhati High Court and allowing Justice R.N. Aggarwal, an additional judge, to revert to the post of district and sessions judge, instead of making him a permanent judge. Justice Rangarajan accepted the transfer as an incident of service, like a disciplined soldier, and moved to faraway Gauhati. He functioned as a judge of the Gauhati High Court till he was

transferred back to the Delhi High Court in July 1977, after the change of Government subsequent to the revocation of the Emergency. Justice R.N. Aggarwal was re-appointed as a judge of the Delhi High Court in the same month.

Justice Rangarajan deserved elevation to the Supreme Court. There are several instances like this of outstanding High Court judges who could not make it to the top. After serving as Chairman of the Monopolies and Restrictive Trade Practices Commission for a term, Justice Rangarajan joined the Supreme Court Bar. In 1988, when a seven-judge Bench was hearing the appeal of A.R. Antulay, former Chief Minister of Maharashtra, who questioned the validity of the directions given by a Constitution Bench in 1984 to the Chief Justice of the Bombay High Court, to transfer the case against Antulay from the Special Court to the High Court and assign a judge of the High Court to try the case, Mr. Rangarajan used to attend the court regularly and follow the proceedings out of sheer interest. As soon as the Bench rose for the day, he would discuss the case with me and offer helpful suggestions for my arguments next day. His contribution to the development of law as a senior member of the Supreme Court Bar is evident from the decisions of the Supreme Court in *S.P. Mittal v. UOI & ors., (1983) 1 SCC 51*, *Tinsukia Electricity Supply Company Ltd. v. State of Assam & ors., (1989) 3 SCC 709*, and other reported cases.

Justice Rangarajan led a simple life. He received in abundancethe appreciation ofmembers of the legal fraternity and the public for the way he conducted himself in court and outside, and for the manner in which he discharged his duties without fear or favour, affection or ill will. The system needs more such judges.

Discovering Rangarajan

Chaturvedi Badrinath

I MET JUSTICE Rangarajan for the first time in December 1961 when he was the District Judge of Tirunelveli. It was the customary courtesy call by the Assistant Collector, Cheranmahadevi, on the District Judge. It turned out to be infinitely more: I discovered Rangarajan. That remained one of the blessings of my life, in the fullness of love, friendship and faith he and his wife, Nappinnai Rangarajan, would unwaveringly give me in all the years that followed.

I vividly recall my conversation with Rangarajan at the very first meeting. It was primarily about the question of truth and the limits of language, with which I was then most occupied. Since that question has been central to the philosophy and the practice of law, and thus to the question of justice, the young Assistant Collector ended by asking the District Judge whether he ever felt troubled by it while judging.To many a District Judge, that conversation would have seemed a strange, at any rate unusual, courtesy call—but not to Rangarajan. He plunged into it. He was a man who without any self-consciousness rose above the formal and the usual. Thus began a friendship that would last as long as he lived.

In very many subsequent events of my life, some of them stormy, but some others in search of the hidden meanings of happenings in human life, Rangarajan's loving assurance was the greatest human help I could have received. To illustrate fully the kind of man he was would necessarily require my writing

about at least some parts of my own life; or, in other words, writing about my own life would be impossible without my writing about Rangarajan. I believe that many others who received from him his love and caring would say the same thing in relation to themselves.

In this tribute I will speak only of two characteristics of Justice Rangarajan, both rarely seen in this world. As a judge, he was the least judgemental of all the persons I have known. Being human, he had his own share of emotional hurts and pains, some of them deep, of which he spoke to me without reserve. When he did, there were no final pronouncements on why a person behaved in the way he or she did. Just as one might say, in seeking an explanation for somebody's sickness, 'Maybe he drank some impure water somewhere', Rangarajan spoke, in that spirit, of those who had caused him disappointment or hurt. Sadness there often was, but no vitriolic judgments, so commonly heard.

In 1975 the Government of Mrs. Indira Gandhi imposed Emergency throughout India, citing serious threat to the country from outside and inside as the reason. There were widespread arrests; anybody who she thought was a threat to her, not just politically but also intellectually and morally, was put behind the bars. Kuldip Nayar, an eminent journalist, was one of them. Rangarajan was at that time a Judge of the Delhi High Court. In a well-known judgment, that became a well-known event, Justice Rangarajan ordered Kuldip Nayar's release. That didn't endear him to Prime Minister Indira Gandhi. She ordered that Justice Rangarajan be transferred to the Guwahati High Court. Were there an Indian High Court farther east, Rangarajan would probably have been sent there—as punishment for upholding constitutional law, justice and truth. He took it with admirable philosophic detachment. He spoke to me about it in the same tone in which one might say, without attaching any significance to it, 'Today is Thursday'. There was from him not one word of anger or of condemnation.

The second characteristic of Rangarajan was related with the first. His genuine respect for the freedom of the mind. However strong and decided his own philosophic and spiritual inclinations, he never, as far as I knew him, made their acceptance or sharing by others any condition of his friendship and love. I can best illustrate this by the following example. Rangarajan was very greatly drawn to the philosophy of Sri Aurobindo; whereas I had honest philosophical problems with at least *some* parts of that philosophy. Rangarajan knew that; for I expressed them to him freely. Furthermore, Sri Aurobindo's philosophical thought, expressed in his writings at different times, historical times and the times within his vast consciousness, was not any one thing that could be described as *the* philosophy of Sri Aurobindo. Some parts of his thoughts enlightened me, as they do now; certain other parts left me cold. Rangarajan was a devotee: I was not. But that did not ever lessen his love and caring for me. And I loved and honoured him the more for it; for that quality is so rare.

Even in his lifetime I often heard it said of Justice Rangarajan, 'He is a very arrogant man'. That was because, or so it seemed, he often said in private conversations, 'Of all the Judges, I am the greatest.' He often said that to me. But whereas some others took him literally, I always noticed delightful playfulness in his eyes when he said that. Neither did he ever fail to notice in my eyes the unspoken question, quite as playful, '*Are* you?' And he would laugh. Arrogance is the opposite of gentleness: what was most clearly in evidence in Justice Rangarajan's conduct towards others was his gentleness.

His gentleness towards his wife was most charming. Even in her presence, he always referred to her as 'Mrs. Rangarajan'; and not only he, everybody, excepting those of his immediate family, addressed her, and spoke of her, as 'Mrs. Rangarajan'. The result was that for many years I did not know her name: Nappinnai. It was not only his gentleness towards her, but also his frequent expressions of how much she meant to him in his

journey through life. That he acknowledged without the slightest reserve, publicly.

In September 1976, when Justice Rangarajan turned sixty, there was even a more solemn acknowledgement of it, in the form of the ceremony of his *shashtiabdhipurti*, performed in Madras (now called 'Chennai'). *Shashtiabdhipuri* is a part of a Tamil man and woman's passage through life as husband and wife. The ceremony resembles that of marriage. Indeed, it is a *second marriage* to each other, signifying that from that time onwards their life in the togetherness of marriage, *sahadharma*, was to take a different direction—towards the vastness of the Impersonal, in which what was personal was even more deepened, but now from a different perspective. Generally, it is a ritual, a rite of passage. Since neither Rangarajan nor his wife Nappinnai attached much importance to rituals, but always to *meaning*, their *shashtiabdhipurti*, at which I was present, was the most moving in the simplicity of their resolve *together*. It was deepened by the fact that they had come for that ceremony from Guwahati, in Assam, where he was sent indisputably as punishment for his judgment in the Kuldip Nayar case during Emergency.

I salute the memory of Justice Rangarajan for showing in his life that justice is not merely a legal and political concept but is inseparable from love and caring, and that the love and caring, he ceaselessly gave to many was not to become another prison for the *other*. He never held anyone a captive in the prison of gratitude. He was a rare spirit, it was my greatest good fortune to have known him.

My Anna

R Desikan

I USED TO affectionately call him 'Anna'. I was drawn to him because of his high intellectual calibre and great affection for me. Our great grandfather, Seshadri Iyengar, was a very pious man of extraordinary brilliance. He was known as the 'Sun of the Dakshina Desam'. 'Desam' in Tamil means 'country'. He is said to have called out to his son when he was dying, asking him to look at the stars to find out if *dakshinayanam* had ended and *utharayana* had begun. It is about the latter time that Bhishma was said to have given up his life. According to our almanac, *utharayana* begins around 14 January every year. His soul departed from the body only in *utharayana*. This is how firmly the family was rooted in high spiritual values.

I read from a book published by a research scholar on Islam, that a Brahmin who was considered a great scholar and pious person taught a saint near our village. One of the Muslim gentlemen—who has a shop in Pattamadai where reed mats are woven and considered as an outstanding craft—told us that it was our great grandfather who taught the Muslim saint. He sent me a book later. Today, that saint is considered as one of the well known saints of Tamil Nadu.

Not much is known about Anna's paternal grandfather, Sri Rangaswamy Iyengar.

Anna's father was also called R. Seshadri Iyengar and was the first son of our grandfather. It is usually the custom here, especially amongst Brahmin families, to name the first son after

the paternal grandfather and the second one after the maternal grandfather, so also the first daughter after the paternal grandmother and the second after the maternal grandmother. Anna's father was born and brought up in Village Desamanickam, in Ambasamudram taluk of Tirunelveli district. This beautiful culde-sac village is adjacent to Sevel. Tambaraparani—which means 'river of copper'—is the river serving this village. The Pazhuvur Dam was built on it during the British days. It connects Desamanickam village and Pazhuvur on either side of the river. The Palayangal canal starts from this dam site and feeds agricultural lands between Desamanickam and Palayamkottai.

Anna's father graduated and took a degree in law. He became a very successful lawyer under the famous Sri A.V. Gopalachariar. He was married to Kamalammal, mother of Anna, and passed away after an attack of the Asian flu at the early age of twenty-seven. This was in 1919. Anna was then only three years old. He was thereafter brought up by his mother in the house 'Gokulam' on Alexandra Road in the cantonment area of Tiruchirapalli. The house was like a huge palace and built in a large compound. Anna was also looked after by his maternal grandfather who was a great Vedantin, a scholar of Sanskrit and a distinguished lawyer. Anna's brilliance thus came from both sides. I believe Anna completed his SSLC when he was less than thirteen years of age and took his ML also at an early age. He was married to Nappinnai, daughter of Dr. B. Rama Iyengar, who worked under Dr. Rangachari, one of the foremost medical practitioners and surgeons in the country at that time. The marriage took place in 1938. I remember the photograph taken during the marriage, which hung on the wall of Gokulam, where he is shown sitting in a car decorated like a temple *rath*.

Anna was very fond of my father—who used to live in Srirangam and ran a motor agency as well as a workshop. The last time I met Anna—in December 2001—he told me that my father was the one who encouraged his thirst for knowledge: 'Your father gave me a huge collection of books in English

which I devoured.' I believe that my father would pick up Anna from college in his car, treat him to sweets and tiffin from a famous restaurant in Trichy, and then drop him home. Anna also had great respect for my father.

The other incident which I vividly remember is when Anna bought a Morris car in Madras and invited my father, my brother and myself for a ride. He first took us to a place called 'My Coffee Bar', which was the most famous hotel in Madras at that time and then took us for a long drive around the Marina. I was very fond of him; to me then, as a young boy, Anna was unapproachable—much too old for me. He was like God to us youngsters. Anna led a life full of happiness and contentment, cherishing higher values and traditions. He was bestowed with intellectual brilliance and creativity, later moulded by Sri Aurobindo's philosophy. I remember him with pride, and see in him the true descendant of our great-grandfather—the 'sun of the Dakshina Desam'.

S. Rangarajan

Writings and Essays

1

Reminiscences as a District Judge

My mind goes back to 25 October 1952 when I arrived at Rajamundry railway station with my family and, learning that there had been no District and Sessions Judge for nearly eight months and a Sessions case had been posted that day, I proceeded straight from the railway station to court for taking over and commencing work as District and Sessions Judge from that moment. That was my first posting as District and Sessions Judge. In October 1953, on the separation of Andhra from the erstwhile province of Madras, I similarly got back to the railway station straight from court, after handing over charge, having been allotted to what is now called the state of Tamil Nadu. So heavy was the work then.

But what a soulful experience, all round, I had. This town, full of affectionate and warm people, had been struck by an indescribable tragedy: the mighty and very broad Godavari breached somewhere in Thoredu and rushed through the low-lying town of Aryapuram, and other areas before the flood waters rejoined the Godavari's lower reaches.

I was awakened by some shrieks, the District Judge's bungalow being somewhat far away from these low-lying areas. Immediately I knew that something terrible had happened. Even earlier, the Godavari was swelling rapidly and its waters were very near the court-house; everyone seemed to be shocked at my pessimism that the flood waters might enter the low-lying

court compound. For that reason, and as a precaution, I had ordered my staff to remove the records in the District Record Room from the lower racks and place them at a sufficient height so that they would not get damaged if the flood waters entered. I could sympathise with them, for my apprehension was not justified by anything that had happened since the Godavari was born! After the Godavari breached, one could go inside the court compound only by boat!

The people had been taken unawares, at a late hour of the night, when they were sleeping. But there was no power, and we had literally to wait for daybreak. I had put on just khaki shorts and a T-shirt and wore only *chappals*, for that was the only way one could really try to do something with one's 'hands and feet'. The official machinery seemed to have completely collapsed. Apart from the usual difficulty due to being suddenly overtaken by such a disastrous event, the entire police force of the town had been deployed in connection with a Legislative Assembly election, in which an underground communist was contesting against S.B.P. Pattabhi Rama Rao (Union Minister of State for Industry at the Centre, having been in charge of Finance earlier).

Quite near my official residence was the residence of Kumar Menon, who was then a young and unmarried assistant superintendent of police, but he, along with his force, was busy at Ramachandrapuram with the poll arrangements. I was told, but I had no means of verifying it, that the highest police official available in the town of Rajamundry that night was a Circle Inspector, who was supposed to be drunk and not available! It was a situation without any parallel whatsoever. I was not a hardened bureaucrat or an official, as a pressman had pointed out then; I had been appointed directly from the Bar within about a year. I was practically a stranger to that place, because that was the way the judges used to live in those days.

Earlier, a very unusual thing had happened. Soon after I joined, disturbances broke out as a result of the death of the late Sri Potti Sriramulu (whose death heralded the separation of

Andhra from the erstwhile province of Madras). Since C. Rajagopalachari, the then Chief Minister, whom I had not even known personally when I was appointed, was a member of the same community to which I belonged, it was believed that I was his son-in-law (*Alludu*)! He was perhaps the most hated man in the Telugu-speaking areas because he was against the partition. The oft-shouted slogan was 'Rajagopalachari Chavala Andhra Kavala Cheppu', a slogan which my second son, who was about three or four years old then used to utter with action *a la mode* the urchins on the street.

When I was going to the court, shortly after the death of Sri Potti Sriramulu, there was a huge crowd on the way to the court-house, and hundreds of women were lying down at the entrance (gate) in order to prevent me entering the court building. All communication lines had been cut, and Rajamundry was isolated from the rest of the province; there was no possibility of even maintaining contact with Madras. I was left to use my wits to cope with the situation. It seemed to me it was as pointless as it would have been folly (when there was a sudden and spontaneous uprising) to attempt to go against the people's wishes under these conditions. I was anxious that all of them should be cleared as soon as possible from that area; an excited mob had earlier in Karaikkudi (now part of Tamil Nadu) burnt the court-house and the records with it, causing any amount of difficulty in reconstructing them.

The crowd was completely disarmed when I walked to the court-house without any *bandobast*. The only difficulty I faced then was that I could not speak Telugu. With the help of a few interpreters, whenever needed, I was able to convey to them (in English) that I sympathised with their aspirations and they could leave the place because I was not going to work. All of them left shouting slogans; I remember some of the young girls asked me what was to happen if I started working later on. I remember telling them, spontaneously, that they could then come back and burn the court-house in that case! They were more than assured, and they left shouting not only their political slogans,

but also some in my praise. Considerable damage which might have been caused otherwise was thus avoided. This was my first brush with the Telugu-speaking people. I never knew then that I would be with them when tragedy and disaster struck them due to the colossal floods. The message of my being kind-hearted had already spread; this was enough background to be able to do something. My wife and I volunteered to do our best to help in our individual capacity, purely as scouts.

People had left their houses and their belongings and fled when they were overtaken by floods. Many of them had locked their houses in the feeble hope that they might come back and recover their belongings in, howsoever damaged a condition, after the floods subsided. But then they had justifiable cause for concern that some of the daredevils, who normally travel on huge logs of wood on flood-waters, would dash against the doors to open them, in order to snatch and appropriate whatever came out along with the water gushing forth. Nothing much could be done to ensure against this, but I tried to maintain as much morale as feasible by going around in a steam launch, surveying the entire flooded town. There was one launch which could be used, but it had no diesel oil. The late A.B. Nageswara Rao, who was then the Municipal Chairman (later Minister of Andhra Pradesh) was able to secure me a few drums of diesel oil, a mechanic and driver. They started the steam launch and, along with Rao and others, we surveyed the town, which was under more than twenty feet of water. A number of people had taken refuge on very high-level points, hillocks, etc.

The first task of the morning was to have some food distributed to those thousands of people who had been stranded in various far-flung places. Rao organised food to be prepared for over a thousand people, and we had it distributed to various areas through boatmen engaged for the purpose.

I could not even imagine how this noble, but by no means well-to-do person, was able to get so much spontaneous help organised at such short notice; he acted like one inspired. The kind of work that was possible to do the whole of that day had

evidently endeared me also to the people to such an extent that my friend, the late Satyanathan, arrived at Rajamundry a few days later and conveyed to me that it was Rajaji's wish that I should be a 'one-man Committee for flood operations' in the entire Rajamundry area, keeping out the usual official machinery, which had not measured up to the expectations of the people at that hour of great distress. This shows the impeccable genius of Rajaji as an administrator; he could boldly and quickly not only pick up those who were required to deliver the goods, but also back them up. It would not have occurred to anyone else to use a District and Sessions Judge to deal with such a situation! When I pointed out to Mr. Satyanathan that I could do so only if permitted by the High Court, in no time I had a wireless message sent to me from the High Court letting me do such work, and permitting me to receive whatever was given by way of aid for flood relief work.

It was indeed fortuitous that I had addressed the students of the Government Arts College only a few days before the floods, when I appealed to them to involve themselves in the amelioration of the plight of the socially handicapped—at least those around the campus. When I went back to them and said that I needed their help, they responded. I had a thousand strong student body to help me in all the relief operations that I undertook. I am convinced that if students' energies are diverted properly for constructive work, this would be highly beneficial. I recall one of the early Russian visitors to this country, soon after independence, observing that we were not alive to the way in which millions of students could be thus involved. We might have avoided student indiscipline completely, if only we could have enthused them for social amelioration. In the wake of the student committee sacrificing so much during our struggle for independence, we could have easily created conditions for genuine and large-scale student involvement in social causes. It was the elders who not only set a bad example themselves, but tried to misuse the students for short-term political ends.

Immediately, I was able to set up a huge ad hoc flood relief office of persons genuinely eager to help. Most of the men, women and children had got out of their houses only with the clothes they were wearing; because they were left with no others, women could not even wash and dry the sarees they were wearing. My wife distributed, to start with, one saree per family, to enable the women to wash and dry each saree in turn. This was Rajaji's idea. It was also his idea that he would request textile manufacturers to supply white mull pieces, so that the women could use them as sarees. He was quick to perceive that even married Telugu women wear white sarees, a thing which married women of Tamil Nadu would not do, even in an emergency like this! Mrs. Clubwalla Jadav, who had engraved a name for herself in letters of gold for the social work she did in Madras, promptly rushed considerable clothing and milk food immediately, even without my asking for them. As an ex officio Chairman of the Guild of Service, Rajamundry Branch, I was privileged to receive this vast measure of help that Mrs. Jadav was able to send under the auspices of the Guild of Service.

Gazetted officers, including Judicial Officers serving under me, were all requested to distribute rice, etc., at fair prices from their own homes, and they cheerfully did so. It was possible to bring down the shooting price of rice when jeeps fitted with loudspeakers went around constantly announcing that people need not accumulate stocks of rice more than immediately necessary, because regular supplies at fair prices would be made available, and if greater quantities of rice were not sold each day, it was due to the need to prevent people accumulating more than what was needed for immediate requirements. Finally, when I entrusted this to the fair price shops, I warned the dealers whom I summoned, that if they were found misbehaving, they would lose their trading licences for good. This had considerable effect.

Tens of thousands of people had to be fed at least twice a day; a number of feeding centres were run; vast numbers of

people had to be inoculated. When Rajaji arrived unexpectedly by plane (at the Madukarai airport) and saw for himself the quality of the goods that we were distributing to the people (which he himself tasted) incurring only a fantastically low expenditure, he was greatly surprised. He could understand only when I told him that the student community were maintaining a great vigil over waste and pilferage, and my wife was doing her best.

A huge contingent of medicos from Vizag came to help with inoculation against cholera (which was breaking out) and to attend to other public and individual health problems. The National Cadet Corp (NCC) also turned up in a big way and helped remove the several thousand huge logs of timber, which usually floated along the river, but had settled on houses and blocked the roads. The roads had to be cleared first to ensure movement. It was really incredible for the local people to see how even young and frail-looking students, trained by the NCC, could organise themselves in such a skilled way as to remove, carry and throw away the heaviest of logs with ease, which even professional stalwarts could not attempt so easily. When I asked those who watched what impressed them most, they said it was the organizational skill of the cadets. This reminded me of Swami Vivekananda's message for India from the US, that what India had to learn from the West is its capacity for organisation. If only our consciousness could absorb on a mass scale this single message, like a *mantra*, and we became capable of needed organization, we could easily and very soon get over all our other shortcomings and be securely on the path leading to great affluence, even as, without it, any attempt to remove poverty can remain only a mere slogan.

The incredible amount of clothing, food packets, milk, etc., that were sent to me were distributed equitably by Mrs. Rangarajan, with the aid of a huge body of social workers, chiefly under the leadership of Dr. Yogeswari, who worked devotedly day and night. My official residence practically became a huge godown for receiving whatever was sent for flood relief work.

There was a railway notification that any commodity sent for flood relief operations to Rajamundry addressed to me would be freight-free. Rajaji, as was his wont, had ensured that all the needed administrative orders be issued from time to time and without any delay. He was keeping in touch with me telephonically, and did me the honour of visiting with me when he came there to inspect the flood affected areas. I cannot be too grateful to him for having told the huge crowd that had gathered to see him off and were pressing for one thing or another, with a meaningful smile, 'what else do you want? I have given you Rangarajan.' He left when the crowd said in chorus in Telugu, '*Anthe challendi*' (that is enough).

At this dire moment of distress, a few well-meaning friends of mine had wanted me to start a Rotary Club which might involve itself in such ameliorative measures. I had been a Rotarian earlier. Out of the pangs of distress caused by the floods, the Rotary Club of Rajamundry was born, with me as the First Founder President. The late Ramaiah Naidu, a retired Divisional Inspector of Schools, threw himself heart and soul into founding the Rotary Club. The Club was able to do a great amount of relief work. The Madras Cabinet unanimously passed a resolution, placing on record its high appreciation of what it was possible for me to do in this regard. The Chief Secretary communicated it to me along with his D.O. I felt that it would not be appropriate for me to even reply to that letter, because the work was only done by me as an instrument of the Divine. Even to this day, it seems to me that I would have been guilty of impropriety, if I had attempted to thank the Cabinet for their placing on record my humble services, done purely out of humanitarian motives.

I was deeply touched twenty-five years later, when the Rotary Club of Rajamundry celebrated its Silver Jubilee, and my wife and I were asked to be present. Both of us were garlanded and taken in a procession, to the accompaniment of Nadeswaram, for the purpose of inaugurating the new Health Centre to mark the Silver Jubilee celebration. It reminded us of

our own wedding day! So great was the warmth and affection which the people of Rajamundry showered on us even after twenty-five years.

Yet another event which took place a little earlier, shortly prior to this Silver Jubilee of the Rotary Club, was the invitation issued by the Members of the Bar of Rajamundry through its President, Nagabhushana Rao, son of my good friend, Mr. Sivaramakrishnayya, a leading member of the Bar, still happily with us, but retired from the profession, Mr. Justice V.R. Krishna Iyer, and Mr. Fali Nariman were also requested to address the seminar arranged during the thick of the Emergency. The son of Mr. Nagabhushana Rao, a law student, had been detained on the eve of the Conference, about which Mr. Nagabhushana Rao did not even tell me or others at that time. It was only later that Mr. Nariman and I heard of this sad event. As a result of representations made in this connection, he was mercifully ordered to be released some days later. His only fault as a student appears to have been that he refused to join the other politically minded students, who wanted to cut classes during working hours and go round shouting political slogans. Not that this boy was averse to doing it, outside college hours—the only sin he committed and, for which he was detained—was that he was not for indulging in it during college time, when they were expected to study. That was also the occasion when, after nearly two decades, I was able to meet most of my older friends at Rajamundry.

What a change had overtaken Rajamundry since it had been reduced to a shambles during the great floods! I was able to see a town brimming with activity, industrialised and showing signs of much greater progress and prosperity than it did in 1952. I was witness to the fact that the area was absolutely backward then, at least twenty times more backward than the most backward town that I had ever known in Tamil Nadu. The agitation for a separate state, I could see so clearly, was really the result of claims for removal of regional backwardness not being met with.

This is a great pointer to the harsh reality that unless backward states or areas are helped with sufficient autonomy and funds, it is not possible to eliminate regional backwardness, so important for maintaining the unity of our country. It seems needless, however, for the country to pay the price of Balkanisation for removing such backwardness. My faith is that backwardness, of various kinds, *could* be relieved by a systemic and objective approach to the entire problem by not only providing for devolution of needed funds from the Centre to the states, but also from the states directly to the local bodies. But what seems so necessary to get rid of are political overtones. Some of my friends in politics told me that this is not politically feasible. I cannot appreciate this. I have to content myself with merely assuring them that the course suggested by me is perfectly legal and constitutional and that it seems unavoidable.

When I thus went back to Rajamundry after such a sizeable distance of time, I did miss some of my old friends, not only in the Bar, but even some of the staff members who loyally served me as members of the judicial establishment as well as some public figures. The cruel hands of destiny take away so many fine people, regardless of their distinction.

I have to express my indebtedness, in professional terms, to the late Someni Kameswara Rao who, at my request, always gave me the entire case law bearing on any legal question which arose for decision in cases in which he appeared before me, regardless of whether those decisions went in his favour or not. This was in the finest traditions of the Bar. Kameswara Rao was a Homeopath of some repute as well. One day in a week he used to sit with his massive medical chest to treat so many who used to seek his help in that field. He was indeed a great example of a lawyer who, despite his lucrative practice, still found time for what he loved to do. When I left the place, I called on him to take leave of him, and saw for myself his huge library; whenever he appeared, he would bring his own books to cite from, books not available with any other person at Rajamundry.

What the Bar libraries really lack at district centres are the books needed, the indispensable tool of the legal community.

I had a feeling that, despite my good fortune in having a rather intense practice at the Bar for a period of fifteen years (having inherited a practice of nearly three generations of my own family, being the fourth generation lawyer) the real education of a judge, whatever he might have been able to do earlier as a lawyer, commences with his being elevated. I felt so humble before a task so great and noble to be performed. It is a terrific responsibility having to decide disputes between fellow-men; I realised that I had so much need to educate myself all over again. In order to equip myself to be able to decide cases not only impartially (as one must) but also with the requisite skill, I started reading, once again, some of the leading text books in various branches of law, substantial as well as procedural. This has been an on going habit with me, of reading as much as possible; also what judge Cardozo prescribed as a useful exercise for a judge—to read at period intervals at least some of the judgements written by himself, specially those which might have appeared to him, at the time he wrote them, to have been of some quality. The feeling invariably, whenever this was attempted by me, was that I had no reason to be proud of any of them, and that I could have done so much better.

It was here that I learnt my first lessons in judicial administration. It all started with a handicap; it is the mercy of the Divine that what appears to be handicap in itself, later becomes so helpful. My Sheristadar then, on the verge of retirement, did not inspire confidence. I therefore asked the then Head Clerk, the late Mr. Simhadri, to help me in all administrative matters, wherever I required help, which he gave so willingly and devotedly, that I must truly acknowledge that if I achieved any measure of success in judicial administration in the various districts of Tamil Nadu later, the foundations were laid by this loyal, absolutely dependable, upright and knowledgeable officer. He was not a graduate, but in his field of work he was more able than any graduate could be. He was later promoted as

Sheristadar, in preference to a junior graduate, despite a rule giving graduates some preference.

I had rare occasion to look closely into the whole period of the work of a certain judicial officer at a certain station, in order to assess the quantum of work done each day by him. This experience alone, among many others, gave me sufficient insight into the way in which a District Judge could profitably oversee the work of judicial officers, in order to ensure that they did the quantum of work expected of them. If the impression gains ground that the District Judge is sufficiently knowledgeable, spares no pains in the matter of ensuring that good work is appreciated and lapses will be firmly but politely pointed out, the judicial officers on their part will, by and large, measure up to expectations. When a District Judge himself is slack, the entire judicial administration becomes slack. This is what I learnt in this place. It is also not often-times either known, or remembered even if known, that there are several well-tried ways by which arrears can be controlled. Some of them are that each and every District Judge (a) should exert himself to personally assess the work of each judicial officer, both qualitatively and quantitatively, and not leave this work to be attended to by other ministerial officers, merely content himself with signing the proceedings put up to him; (b) insist on a fair number of older cases being disposed of regularly; (c) insist on current cases, which are not old, being taken up and disposed of to prevent cases from becoming old; and (d) to achieve all this, recommend in time and in advance the appointment of additional judges whenever required. Conditions should be created for the State sanctioning the required additional courts promptly. My experience, in many parts of this vast country, is that it is the neglect (studied, as it may even appear) by the State to attend to this important requirement which is the chief cause of mounting arrears. Mere constitution of committees to go into how judicial arrears could be reduced will be of no avail at all. It is of great importance to secure the cooperation of the Bar. My experience is that the Bar usually supports those who are able to carry convic-

tion about their own keenness to be of some service here. The District Judge is the real kingpin in the matter of tackling vigorously the problem of judicial arrears in the district. When I was sent to Kanyakumari district (a district newly taken over from Travancore) there was a nearly fifty-year backlog, an inheritance from the older Travancore area, merged with Madras State under the States Reorganisation Act. Most of them were frivolous cases; the ease with which frivolous cases could be filed and matters stayed, itself leads to an almost impossible situation. When systematic attention was paid to this and allied aspects, on a warlike footing, it seemed possible to get rid of the backlog in less than eighteen months. If I am referring to some of these experiences, it is not in a spirit of self-glorification, but to convey the message to those in authority that there is no task which is beyond attempting. One must be ready to pay the price for it. Initially I found some resistance from the Bar; but this was not very perceptible. Later, the Bar felt that what was being attempted was in the all-round interest. On account of the extensive strain, my health broke down and I had to take long leave to recuperate. But my happiness, till today, is that so much was possible for me and those with me; there seems to be no greater joy today than being able to contribute in some measure at least to toning up judicial administration; this is vital to us. Speaking of arrears, it is of the utmost importance to ensure, at the same time, that quality of disposal does not suffer. The Madras of those days had a great tradition in this respect. Even a handful of judges used to keep the flag flying; they knew that while justice delayed is justice denied, justice hurried could be justice buried. It did not fall to my lot, however, to be able to give of myself a little more in this direction, because I was not Chief Justice anywhere. This is hardly the occasion to go into the reasons for this. But comparing small with great, I am reminded of Justice Holmes even refusing to be Chief Justice of the U.S. Supreme Court on the ground that he would like to employ all his energies for judicial work alone. I share his view that, for one who wants to do one's best in the area of deciding

cases, it would be better not to take on administrative matters. If I am taking so much time and space on an occasion like this, it is only to help recall, when the Rajamundry Bar is celebrating its centenary, the glorious traditions of which it itself was part.

I felicitate the Rajamundry Bar on its completing its centenary. Having reminded the members of the Bar of their great inheritance, I have no doubt that they will do everything to keep the flag flying.

2

The Law and Social Aspirations

THE DREAM OF the late Pandit Jawaharlal Nehru that our democracy should be of a socialist democratic pattern is yet to be realised. We seem to be perhaps receding further and further away from that ideal, so close to our beloved Panditji's heart, and for which he so valiantly and incessantly toiled all through his life. The real monument that we can raise to him is not to raise golden mausoleums over his dust, not even of marble, cement or brick, but to build a socialist republic of his dreams, on a solid and lasting foundation.

Whenever I muse over this, it occurs as a shock to me that this is at par with so many foundations that we raised since we gained independence, but pathetically allowed to remain unfinished. Many foundation stones have been laid, over which there have been no further construction for years, yet we persist in having more, oblivious to, or in total disregard of the fact that there are so many unfinished items on our national agenda. These items conceived with great toil and expense, alas, are pitifully neglected, or abandoned, or allowed to remain exactly where our incipient efforts took us.

I would like to draw attention to the incomplete, or what seems nearly abandoned, task of our building a 'Socialist Democratic Republic', as envisioned by our great—perhaps the greatest—son of India, who sought our until-then-slave nation's 'Tryst with Destiny' on one unforgettable midnight.

What is all this rhetoric about? Am I merely romanticizing? I hope not; it is at least not meant to be so.

All the established and sophisticated legal systems of the world, whether of the civil or common law mould, seem to be cracking under the pressure of our growing realisation that the law has not kept or fulfilled its promise. On the contrary, it is fast becoming an engine of tyrannical oppression, crushing the downtrodden and the weak. The old Benthamite utilitarian doctrine of 'the greatest happiness of the greatest number' has only turned out to be a case of the greatest happiness of the least number, and the maximum (intolerable) unhappiness of the greatest number. With the population explosion, and the frightening prospect of an even greater load, particularly in the least developing and developing countries of the world, this problem of maximum unhappiness of the greatest number has assumed quantitative proportions, which is nothing less than alarming.

But what do we see as the reaction to this from the developed countries of the world? They have almost produced a stalemate in what is described as the 'North-South Dialogue', and which is nothing short of a myopic vision of the developing countries. They seem to be treading on quicksand, where the greater the effort on their part to pull out, the deeper they seem to be sinking. Despite their realization that the limits to further growth, in certain industrial fields at least, have been reached, as, for example, in the automobile industry, where there is no possibility of their own people being able to consume more automobiles, as the saturation point has been reached already, in terms of the motor vehicles-to-individuals-ratio, they would not embark on a plan of letting the less developed countries of the world share this amenity. Hence, automobiles are still the most expensive items, bordering on luxury which the bulk of the developing nations cannot afford. The developed countries would only wish to locate their automobile or automobile parts industries in the developing countries, which they cannot afford at all, unless those who seek to do so would also help im-

prove their foreign trade, without which such an effort would become unfeasible.

The plain and stark truth of the matter is that the developed countries, or the entrepreneurs hailing from those countries (the ugly 'multinationals' as they are called) are not only toeing a very hard line on such matters as transfer of technology (replete with restrictive trade practices) but the industrial machines of these developed countries are also indulging in an armament-manufacture-sale race that enables (or rather compels?) most of the developing countries also to go in for armaments on a scale which completely destroys their already sick and unviable economies. Still worse, the developed countries seem to raise their protective walls against exports from the developing countries, the latest slogan being not 'fair trade' but 'free trade'; the starving weakling and the overfed Goliath are free to fight against each other.

Hence, even the hitherto unexploited resources, like the great wealth buried in the seas spread over two-thirds of the globe's surface, are not to be made available for the welfare of the poor. It is not difficult to find specious and ingenious arguments to support all these indefensible manoeuvres, for there are more than enough so-called intellectuals on our increasingly small planet, who can organise existing knowledge and expertise, both quantitatively and qualitatively (the latter being a newly-emerging frontier in computer programming) to the detriment of the poor. The penetrating satellites scan the globe in such a way that the rich can accurately predict which portion of the poor-belt is going to be famine-stricken, owing to a failure of the monsoons, and corner global food supplies (in an already hungry world). The only redeeming feature here seems to be that the socialist bloc, which seems equally capable of such forecasting, proves a countervailing force.

If this is the global scene, the domestic scenes of the poor countries are even more deplorable. The current debate between the Rich and the Poor is being confined, though in a concealed manner, to the Poor making demands, and the rationale behind

such demands is invariably not extended to the domestic situation. The political machines of the developing democracies of the world, which are only becoming increasingly corrupt, have thus placed a powerful propaganda tool in the armoury of the Rich. Hence, any help on the part of the Rich is only helping the corrupt politicians of the developing countries to fatten themselves by such corruption, and the people of the richer countries of the world are not going to tighten their belts merely for this purpose. As a student of the world economy, and one specially interested in following this North-South Dialogue, I feel that this is the greatest hazard so far to the task of relieving global poverty, especially in the poorer countries of the world. This is what had led me to focus in this brief paper, on this one aspect alone, among so many pressing international economic problems.

In sociological terms, any form of deviance is what robs any institution of its legitimacy. When this process takes place, only the outer shell remains. Corruption is undoubtedly a major form of deviance. Writing about the decline and fall of the Roman Empire, Gibbon explained how corruption flourishes in a decaying civilization. I have myself gone through several hundred studies on corruption in both developed and developing countries; it seems near disastrous in a developing situation—the developing countries can least afford it, but it is in such pockets that corruption seems to flourish most.

A particularly insightful study that I have read is what happened in our country, where there was a paucity of foreign exchange. Indeed one of the desperate remedies suggested for getting over corruption has been that corruption itself be legitimized! The obvious result of doing so will be that there cannot be any rule of law in such a context. Every form of deviance undermines legitimacy and the legal system in a rule-of-law frame will itself be completely undermined thereby. This is something similar to people in a democratic context wishing for a dictatorship, where the situation worsens. Or, it may be even like saying that, if the difference between something morally wrong and a

crime is that the latter is punishable according to the law, in order to put an end to crime, one legally decrees that no so-called crime is legally punishable.

I would be concentrating myself here with only some of the many shortcomings in our legal system, which have made it an ally not of development, but of further underdevelopment. This is perhaps the main cause of the legal system itself being robbed of whatever legitimacy may still be left. We should remember that our closed society—closed for ages—has been transformed from an 'ignorantly contended' one into an 'ascriptive society'. Three decades of the working of our Republic has at least aroused expectations and made people more conscious *en masse* of their being weak, exploited, downtrodden and helpless. This is itself not to be decried, for our masses should indeed become even more aware of their rights and what they should expect from those who govern them. If the growing awareness has some evil fallouts, they are like the poison that first came out when our mythical milky ocean was churned for nectar.

The churning itself was not abandoned when the poison came out; more churning ultimately yielded the nectar capable of causing immortality. For such ills of our democracy caused by masses of our people becoming more and more conscious of their rights, owing to an increasing awareness of their lowly state, the remedy must obviously lie, not in the direction of containing such growing awareness, but in promoting still greater and more extensive awareness.

Perhaps the greatest weakness of our legal system is that vast masses of our people do not have any real access or even possibility of access to it. Our legal system has hitherto existed for all practical purposes, only for the infinitesimally small number of well-to-do people. This is still the only country in the world where even the prospect of justice being meted out, is being sold by a crushingly heavy court fee and other forms of procedure. There is throughout a very adverse judge-to-litigants ratio. Procedures, instead of being the handmaiden of justice, are turning out to be 'booby traps' which are impediments to jus-

tice. Only due to poverty of imagination, has our learned legal community been turning its blind eye to this problem, and talks with smug complacency of there being no better alternatives. Our movement for legal aid has not caught on as a movement; there are, at best, only sporadic efforts to provide legal aid. My unfortunate experience, even here, has been that those who come forward to render legal aid are generally more concerned with their own image building or eager to jump onto the bandwagon of legal aid to further their private ends.

This is no mean task; on the contrary, it appears so formidable that it appears foredoomed to failure on the lines conceived yet. It will be impossible to provide lawyers for all indigents who need legal services but cannot have them—this is owing to the sheer size of this country and the colossal expense, which it cannot afford. The more sensible thing, therefore, is to think in terms of viable alternatives. I have been pleading for a system of contingent fee, under strict supervision by court, so that this may take care of a large number of legal calamities, in at least what is known as collision or running down actions (such cases alone run into astronomical figures). I have also been pleading for a huge network of Small Claims courts, which will be manned by knowledgeable activist judges, who can efficiently, effectively and expediently deal with all such cases, where it will become counterproductive (at least owing to the cost, which such a small claim cannot bear) to interpose a lawyer. This is only a common sense way of solving the problem by asking ourselves the question, 'in how many cases can we do without a lawyer (instead of having to provide a lawyer)'?

We have not yet thought in terms of providing a suitable and effective forum for resolution of disputes outside the formal legal system. The majority of the cases in the Delhi High Court, where I worked for nearly a decade, are between a citizen and the State. The proceedings are mechanically pursued by the State against the citizen upto the logical limits, regardless of their merits, at the State's expense, and without providing the citizen with any grievance-redressal machinery. It should

not be difficult to take away all such litigation outside the purview of the higher courts, with the beneficial impact not only on the congested dockets of these courts, but also on the promotion of better citizen satisfaction. Private arbitration has all but failed, our indigenous dispute resolution processes, even to the extent to which they still survive or retain their legitimacy, have not been systematically studied and intensely activated. Our international trade is on the rocks, primarily because we have not provided those foreigners commercially dealing with us with a viable arbitral procedure, which can be not too long but effective.

The law student, while he has some idealism within him, is not sufficiently exposed to problems of poverty; once he is thus exposed and is bitten by this bug, he is bound to be a lawyer of a different quality. Our legal education is the least practical; it almost ensures that when a lawyer is allowed to practise, he is completely ill-equipped to discharge professional responsibility. Even the old system of a junior devilling for his senior (may be an euphemism for unmitigated exploitation) for long periods of time, no longer being there, the new entrant to the profession is only left with a fighting chance of gaining professional expertise at his clients' expense. The judiciary has naturally to be composed of such lawyers.

I come from a state where the level of judicial performance was indeed very high; when selections ceased to be based on merit, a new low was touched, owing to not only completely discarding the notion of merit, but even oppressing those with merit. Caste and other narrow considerations in selection of judges at all levels have spelt disaster, all over, to the legal system. It is odd that all this has gone under the caption of 'social justice' overlooking the obvious. It has turned out to be at the expense of rendering justice to those who need it.

Despite all the above difficulties we face in these and other ways, we can (granted the will, especially political will) find some solution, sooner or later, to many of these problems. But by far the more compelling and urgent problem is to find ways

and means of making our rule of law itself a reality by restoring legitimacy to it. This has a great deal to do with the problem of distributive justice.

The problem of equitable distribution of the nation's resources has long defied any practical or reasonable solution. At the conceptual level, it has been tackled through a legal framework of the most rigid description, which has been found hardly equal to the task, not deriving societal support from anything other than the instrumentality of the law. At the root of all juristic thinking lay the theory of social contract which, in the hands of philosophers like Hume and Locke, were only attempts to justify whatever was taking place when they propounded their respective theories.

Without abandoning the basal theory of social contract, it was left to John Rawls to make, almost for the first time, a conceptual modification of the theory of social contract permitting the greatest ever advance on what the utilitarian Bentham found possible. Rawls posited the Original Contracting Parties entering into a contract behind a veil of secrecy in the Original Position (O.P.). In coming to a decision as to what should be just, including the distribution of any existing resources, those dividing the cake for the purpose of sharing it are not supposed to know on which side they would be and what would be their share of the cake, as cut by them. This was supposed to introduce the needed objectivity and avoidance of inequity in such sharing arrangements. It was also realised that by any kind of social arrangement, it was not possible to avoid inequalities altogether; the justification for any existing equality could only be that which is not in excess of what is found unfeasible to avoid. In nearly seven hundred pages between hard cover, Rawls has gone into any number of details to work out the aforesaid two major propositions in his great work, *A Theory of Justice* (1972).

Since he wrote his thought-provoking and seminal work, there have been over one hundred scholarly writings on the theme of his work. There is no space here to go into them,

except to indicate that this great work furnishes an indispensable springboard for planning a socialist democracy in a rule-of-law frame. The only regret is that this seminal work, a couple of decades old, has not permeated very deeply into our academic thinking on this subject, not to speak of the utter absence of penetration of this great concept in social, political, economic and legal fields.

Whether it is the capitalistic model or the socialistic model, a legal framework coupled with legal enforcement has been found indispensable. In the Russian situation, in the wake of the need felt for economic reform, and brought about in the 1960s, came the realisation that economic planning should have an enforceable component. On the capitalist side came the realization that the law could not be an instrument in the hands of the haves for depriving the have-nots of their due.

The old controversy as to whether there could be social, economic or political change through the law alone is about ended. While it is obvious that the law by itself cannot produce such change, it cannot also be denied that, coupled with the support of instruments outside the law, it could not only be the harbinger of change but even accelerate change. Speaking of change, one has to reckon units, not only the rate or speed of change (in a context of changes taking place rapidly, but also of multidimensional change). Law, believed to be lagging behind the felt necessities for change, has now to face one of the severest challenges of not only bridging the gap so far as delay is concerned, but also sometimes being in the vanguard of change.

No wonder there has been a great crisis in legal ideals in this rapidly changing world. Consequently, there has been a terrific onslaught on the older ideals expressed by and through the instrumentality of the law.

We encounter here the problem of obsolescence, which is aggravated by a high degree of legislative inertia, which has to be met primarily by judicial activism. Judges have helped to fill gaps in the law, and update and modernize laws that have become obsolete. The problem with judicial activism is that it has

been looked upon as an absence of democratic accountability. Nevertheless this has been restored in some measure by the very ideals of judicial independence; even insulation from governmental and popular pressures being regarded as the only bulwark against being swept off and thus ceasing to play its required and intended role. Some of these problems are being penetratingly analysed in recent years, of which I may only mention the work of Professor Koopman.

It is not as if a judge is insulated from societal realities; his very involvement forces him down to face harsh realities. It was Judge Cardozo who warned creative judges against being afraid of being creative—creative opinions, until lately, having been the exception rather than the rule. One of the defects concerning retroactive judicial creativity, which takes parties by surprise, has been to some extent at least offset by the judicial technique of prospective overruling. But the whole problem has to be appreciated in its totality, as one of providing access to courts, to education, and all the material and intangible goods for the people. It is another facet of the equality principle, namely, of equal accessibility to the legal system. For reasons which are not possible to detail here elaborately, judicial lawmaking is viewed not as antidemocratic *per se*, but rather its opposite. If there is any antimony here, it is one to be resolved not by avoiding judicial lawmaking (which is totally impossible) but only by relying on nursing all that goes into the making of good, expert, devoted, sensitive, responsive and responsible judges, who have to do a kind of tightrope-walking all the time; not indulging in usurpation, under the guise of activism, of what is not theirs, or resorting to self-abnegation, under the pretext of judicial self-restraint.

The swing, which seems possible, is from the stand or attitude, under the cloak of not entering the political thicket (a sheer euphemism for mere obsequiousness to State power) to the other extreme of posing as the weak but giant killer. All these require much prudence. As one wisecrack said, 'Jurisprudence is only prudence but one storey higher.'

All this cannot be the lone work of judges. There is a great responsibility on the bar to give the needed expert support. There is also a special responsibility, as Professor David said, of comparative scholars to search for the profound connections and trends which move the reality of today to become the reality of tomorrow. It is such search alone that can give concreteness to our hope for a new and just society.

If the European lawyer preceded the European law, it was no mere accident. This is where academic responsibility has to begin. The curriculum should consist of basic courses which present the national law in the context of legal ideas and ideals which are present in the legislation of different nations and how judges have handled them. It is important that even the method and style of lawmaking and legal arguments should themselves undergo deep transformation.

It was Prof. Maitland who said, 'taught law is tough law.' What is taught is primarily general doctrine, serving as foundation for the lawyer in afterlife, making him cling to them even as he may cling to the religious beliefs he learnt at his mother's knees. In a fast-changing society, social necessity itself changes. The very act of posing questions and calling for answers stems from such necessities. It is important that the legal community becomes aware of and sensitive to the necessities, articulated or even felt. I may be guilty of irreverence when I say that the questions which we pose as lawyers and judges and the answers which we seek, do not usually appear to be in the direction of strengthening our legal system, making it legitimate or helping restore legitimacy where it seems lacking.

It has been pointed out by insightful scholars that the road to be travelled, from the question to the answer, is laid down by juristic doctrines and methods. In the European Community, England, which has become a party to it, has undergone the most powerful impact. English judges have progressed from the earlier regressive attitudes, common enough till the turn of the 1960s; the couple of decades that have since gone by have wit-

nessed profound changes in judicial approaches and methods, much to the good of that nation.

It was not until the House of Lords, through Lord Diplock, pronounced in *Town Investment Ltd.,* vs. *Department of Environment* {1977 (1) All E.R. 813} that public law, not private law, governed a situation, where public law notions were previously regarded as not applicable. This has only to be contrasted with the distinction between public and private law having been always recognised as a matter of primary practical importance in the Continent. Lord Denning frankly confessed the impact made on him rather recently, when he encountered Continental jurists handling some of these concepts, unfamiliar to English lawyers and judges, with ease.

This is because in the Continent the things that matter are not the words but concepts which are the tools of the common lawyer's trade. European legal education itself aims at (as distinct from legal education in the common law countries) the lifting of the conceptual veil. This would enable things to be seen that are concealed, unlike what Holmes said, concerning the 'inarticulate major premise' of a judicial opinion.

The structural method of interpretation, for example, may help sever the umbilical chord holding the lawyer/judge of the Anglo-Saxon tradition to words alone, at the expense of structure. The lack of ambivalence and uncertainty of results, which structure alone, more than mere words can ensure against, seems the need of the moment.

The Supreme Court of India has, in the past two or three years, opened up a new dimension, as it were, to invest the legal system with more credibility, in an effort to restore its legitimacy. They are too well-known for me to recount here. These incipient efforts have also helped raise eyebrows; this is only natural in a tradition-bound and fairly rigid system which has many colonial hangovers. It may be sufficient, in this light, to pay adequate heed to the warnings given by those sincerely devoted to our legal system and keen on preserving its primacy.

Such warnings are indeed necessary, because in one's zeal to open up new avenues of access to the legal system, there are also lurking dangers, at least due to the euphoria. But with awareness of those lurking dangers, and great dedication backed by the needed expertise, the legal system can be safely set on a new but chartered course. This should not really be a cause for alarm. I would only take this occasion to point out that there should be more and more discussion of these themes and greater public participation for, as a great American judge said: 'Sunlight is the best antiseptic and electric light the best policeman.' In moments of crisis, it is always good to rely on expertise, but be restrained by needed caution, yet without losing daring and a sense of adventure, for it is in such moments of crisis that there is great need for daring and adventure.

3

Equal Justice Among Unequals

Man is neither angel nor brute and the unfortunate thing is that he who would act the angel acts the brute. —Pascal

THE TASK OF building an egalitarian society, anywhere, is a stupendous one; in a developing country it seems even more stupendous. A perspicacious student of world poverty and of the Asian scene, Gunnar Myrdal, says: 'The conclusion I have reached is that *inequality and the trend toward rising inequality stand as a complex of inhibitions and obstacles to development* and that, consequently, there is urgent need for reversing the trend and creating greater equality as a condition precedent for speeding up development.' It is proposed to have only a glimpse of the long and varied contour of the problem of inequality facing us today in the region of law and poverty, in order that the role to be played by the members of the Bar of this vast country in promoting equal justice can be at least dimly perceived.

The figures concerning levels of poverty in our country are too well-known to be recounted. It would not seem an exaggeration to say, even without the needed statistics to support that statement, that probably ninety per cent, even at a most modest estimate, of our country's population is without the means to assert its rights when they are either threatened or even impaired; this by itself is bound to have a great impact on the scale of exploitation—the mere possibility of exploitation is

itself a fertile ground for such exploitation. It would not seem possible to justify the working of a legal system—a really good one, no better being in sight—which does not provide for the actual requirements of such a huge section of the population. The task, then, of bringing those who have been thus left out, within the pale of the legal system, in real and effective terms, is very urgent, and will not admit of being further postponed.

The Bar of this country is heir to the traditions of the English Bar, built from the Middle Ages upwards. In consonance with those traditions, and to suit our situation, the Bar Council of India has provided:

> Every Advocate shall, in the practice of the profession of law, bear in mind that any one genuinely in need of a lawyer is entitled to legal assistance even though he cannot pay for it fully or adequately and that within the limits of an Advocate's economic condition, free legal assistance to the indigent and oppressed is one of the highest obligations an Advocate owes to society.

Earlier, the Asian participants in the New Delhi Congress of the International Commission of Jurists felt that in the actually existing conditions, an adequate system of legal aid would be impossible without State aid. The American participants, however, were of the view that the primary obligation rested on the legal profession to render legal aid, and that interference by the State in its free functioning in this regard would undermine the independence of the Bar as a whole. The following compromise was reached:

> The primary obligation rests upon the legal profession to sponsor and to use its best efforts to ensure that legal advice and representation are provided: An obligation also rests upon the State and the community to assist the legal profession in carrying out this responsibility.

It is in the actual translation into practice of these obligations, recognized both by the profession and the State, that dif-

ficulties are encountered. Rhetoric can often help conceal the gap between promise and performance.

Implicit in the concept of professional responsibility is the need to preserve and foster its truly professional characteristics, without which the profession cannot function in the expected manner; also implicit is the true nature of professional service that the lawyer is called upon to render, based on public interest. If Rosoe Pound was right in stressing the social engineering aspect of law, it would follow from that very premise that the legal profession is ultimately a branch of social service. This is not to suggest, however, that all lawyers convert themselves into a band of missionaries. Not only would this be unrealistic but it may also run the risk of weakening professional standards, by which expression is also meant the efficiency which is invariably associated with it. A discussion of this topic, therefore, if it is to be realistic, must not omit to pay regard to every support which the professional organization would require for its efficient functioning. What is, therefore, practicable to stress would be the need for enlightened self-interest. It would be good for lawyers to realise that their very survival—also of the rule of law which they serve—depends on their willingness and ability to meet this great challenge.

The grim fact is, however, that judged by what the profession has been able to achieve, at least during the past decade, when there has been so much and such constant talk of legal aid, there does not seem to be much to list on the credit side. Yet, it would be wholly wrong to suggest that the Bar has not been really sensitive to this need. It must be within common knowledge that whenever any scheme of legal aid is explained to groups of lawyers, it meets with such spontaneous response of offer of help—only these offers of help do not seem to be remembered continuously or for long. For my part, I do not see any falsity in such spontaneous offers of help: they are, without doubt, expressions of genuine concern for the indigent who needs legal aid. It seems to me that the failure to follow through with concrete action may be attributable to the lack of organi-

zational and institutional frameworks for providing such aid; it may also be due—perhaps less—to the failure to realise the sheer urgency of the task and the actual dimensions of the problem; it may also be due—perhaps more—to the feeling of sheer helplessness to be able to tackle, on any individual basis, such a huge problem. In the last event, it would call for a realistic appraisal of the manifold small ways in which every lawyer can help, here and now; by so doing, a great movement towards legal aid can be generated. It is now realised by those who have thought deeply about this problem, that any movement for legal aid is itself a movement for legal reform.

It is in the above background that I shall refer to only a few of what I regard as the most salient aspects, so that the Bar may ponder over and remember them:

1. The Bar has a monopoly to practise before courts and tribunals (except in the rare cases where it cannot appear before the latter as of right). The report of the committee appointed by the state of Gujarat, which was presided over by Chief Justice Bhagwati (as he then was) has considered it necessary to remind the members of the Bar of their moral obligation to render assistance to those who cannot pay for it. The report proceeds with respect, rightly, on the assumption that the profession is willing to contribute its mite to the cause of legal aid.

2. It is not merely in the sphere of legal aid that the capabilities of the profession, and even of the State, are exceeded by their obligations; this is so in the case of medicine, health, education—to mention only a few out of so many such fields. The only permissible question, therefore, is whether the profession and the State are doing their utmost in this regard.

3. When obligations far exceed capability, there is an undeniable residual duty on the part of the State to step in when private agencies do not adequately respond to the challenges; the unfortunate consequences might sometimes be that the effects of such intervention may become worse than the disease itself.

The Gujarat Committee seemed to have been alive to the possibility of socialization of the legal profession itself and the

possible attendant danger of the independence of the Bar itself being then undermined. It has been concerned with the more recent phenomenon of disproportionately high fees being charged by those who are frequently sought after by not only those litigants who have the needed paying capacity, but even by those who despite not having such capacity are naturally anxious to secure the services of the ablest.

Among the several suggestions of a practical nature made by the Committee is the creation of what is called 'the public sector in the legal profession'. This new idea may at first cause a blush or even appear somewhat shocking to the profession; when examined carefully, it may serve to bring out both the nature of the problem as well as the nature of the attempted solution. Broadly, and briefly, the whole idea is to make available public-spirited lawyers of marked ability who may constitute this public sector, in order that *bona fide* litigants who require their services may—through a public agency created for this purpose and for a small consideration (designed to support that agency)—be able to secure the services of such lawyers for what is considered as a reasonable, as opposed to a disproportionately high, fee. The services of such or even salaried lawyers of ability may also be made available, in a measured manner, subject to feasibility and after proper screening, to *bona fide* litigants who either cannot pay fully or at all. The suggestion is aimed at breaking the monopoly of those very able lawyers charging disproportionately high fees—a kind of fair price shop to bring down prices! In other words, this suggestion seems to subsume, that if the profession does not discipline itself on ethical lines, socialization of the profession may have to be relied upon to furnish the (needed?) ethic-based discipline. The compulsive requirement of the situation is that the initiative in this regard (fruitfully) comes from voluntary efforts of the Bar itself.

It may be well to make brief reference to the current thinking, elsewhere, on this aspect. I would like, in particular, to call the attention of the Bar of this country to what Michael Zander, who expounds the concept of the public sector in the provision

of legal services, has to say concerning the British experience. Explaining Parts I and II of the Legal Assistance Act of 1972,[1] he refers to Part I (known as the twenty-fifth plan) which has since come into force, and Part II (relating to neighbourhood legal centres being staffed by salaried solicitors, whereas Part I provides for reimbursement of costs from public funds of private solicitors who would charge a specific sum only for consultation and legal services) which is intended to be brought into force after gaining experience in working Part I. He thinks that the Act of 1972 could well prove to be a milestone in both strengthening the capacity of the private practitioner to help indigent clients, and in providing the means whereby for the first time in Britain the Government can be indirectly responsible for the financing of a public sector to supplement the work of the private legal practitioner. He also thinks that the future in Britain, as in the United States, lies in some form of mixed system, in which both the private practitioner and the salaried lawyer are able to play a part.

Compared to several other countries, the ratio of lawyer to population cannot be considered to be so adverse; the known figures help fix the Indian ratio at 1:5000. The ratio is much poorer in a country like Japan. It is only in the last decades of the nineteenth century that traditional Japan began to import Western law, with its individualistic premises and its generalized abstract principles, into a society which largely relied on the technique of mediation or adjustment, not litigation; each situation was resolved in terms of its highly specific and often exceedingly complex social setting; the dangerous rule was that raw power and violence could prevail when the social fabric proved inadequate to resolve dispute.

When these and other aspects were discussed at the Conference on Japanese Law held at Harvard in September 1961, there was, Arthur Taylor Von Mehren reports, general agreement that Japanese traditional relations dissolve or alter especially in response to urbanization and industrialization. Court costs were relatively very high; the Bar was small (6548 practising lawyers

for the entire country in 1960) supplemented by other persons performing legal functions (even with these the number was small by Western standards). Legal advice was rare in rural areas. This scarcity of lawyers did impede protection of human rights.[2] What is pertinent to our discussion is the reported remark of Judge Wysanski at the conference that the Americans are an 'incredibly lawyer-minded people' and that of Arthur Taylor Von Mehren himself, that the deficiencies of university legal education in Japan are the product of a whole complex of forces, the Legal and Training and Research Institute, from which alone members of the legal profession must graduate, putting out only about 350 graduates annually.

In the United States, the ratio of lawyer to population is said to be about 1:800. In spite of this, there is already talk of the need to supplement the lawyer force by para-professionals. There are training programmes for para-professionals taking to a responsible career in the law. This would not only augment the task force, but obviate the need to deploy costly lawyers on law jobs that can be done at less cost by para-professionals.[3] The para-professional would aid the professional lawyer and assist the citizen in understanding, and thereby effectively utilizing, the various institutions within the legal aid system.[4] One may find some remote resemblance to this in our social workers, who are already working in collaboration with Primary Health Centres; they also seem to be doing useful service at the few legal aid organizations that are currently functioning.

We have yet to travel the distance in utilizing the existing lawyers here, and to even help them become more useful; it still seems necessary, having regard to the dimensions of the problem of giving legal aid, its huge cost and our resources both in men and money, to think on such lines even from now onwards. The experience gained so far, elsewhere, in running legal aid programmes, seems to indicate that in many cases it is cheaper to engage salaried lawyers (at public expense) than to finance them in individual cases through legal aid agencies. Christopher Dudley Evans has spoken, somewhat derisively, of the Le-

gal Aid Trade;[5] he thinks that in Alabama (United States) the counsel provided for defending the accused out of public funds are not of the level of prosecutors, and that it may be better and cheaper to secure the services of salaried lawyers for this purpose.

I may also sum up the following views, which seem appropriate for our discussion, expressed in two recent articles on the future of legal services[6] and an editor's note:[7]

> If the law is able to pursue its role as an agent of orderly progress, it should, as a system, functionally renew itself in novel situations—a necessary adaptive process which paradoxically will highlight the necessity of fundamental research, basic thinking and genuine understanding of the essential qualities of the law. The law and the legal profession can no longer lean on the received wisdom of the past. Lawyers must participate in the changing of the old order and contribute to the solution of today and tomorrow. A totally new society is emerging in our midst, and as lawyers we must shape its development. To do this we must take a fresh look at the law itself. By continuously and constructively examining the pressing issues of the day and helping to articulate social aims, as well as providing alternative means for accomplishing them, the legal profession will better fulfil its true vocation, which is to bring about a just society. The university should be continually accessible to lawyers. The lawyer of today has to become future conscious. In an age when knowledge is so swiftly and recklessly used for evil or for good, it is better to be over-speculative rather than over cautious.

Prevention, as in the field of medicine, is important—perhaps even more than it is realised at present—in the field of law. The frame of reference for the lawyers, as I said while addressing the first All India Conference of Lawyers held at Bombay,[8] is litigation; litigation represents a breakdown situation. Efforts to avoid a breakdown, dealing with it to the extent possible, even without reporting to the already overcongested courts, are important. Private arbitrations have not been resorted to on a

very large scale over the length and breadth of this country; even when resorted to, they appear to have proved either not very successful or quick in the majority of cases. The Bar may be more and more concerned in a legal aid setting to avoid litigation, particularly when the parties to the dispute are both or either of them indigent, or require to be assisted. Even in the field of labour disputes, the American example of highly successful voluntary settlements through private arbitration (by lawyers) seems worth intimate study. The whole exercise, therefore, has to be in the direction of protection of human rights, conflict elimination by resort to preventive techniques, conflict resolution outside, or even through, court by private mediation with the help of lawyers (thus relieving court congestion) and relying on courts for final adjudication only whenever required and necessary. Having regard to the essentially rural character of the country's population, greater progress will have to be made with panchayats, with more experimentation in this field. All these potent steps have to be taken in the 'enterprise' of what Prof. Leon Fuller calls 'subjecting human conduct to rules'; without such regulation, there is danger to the legal framework and hence to the rule of law itself. If, in the light of such experience, certain rules are proved unworkable, or new rules are needed, they would require to be quickly attended to by legislation. Those cannot wait for case by case adjudication. The adversary system, which we are using, calls for true insights into its process. J.W. Mohr has something very valuable to say on this aspect: 'The adversary process makes sense in a stable society since negotiations, mediation and arbitration are part of the every day process of living together and only when those fall does adversity become adversary.'[9] Speculation concerning the future of legal services anticipates[10] that entirely new methods of settling disputes will arise; people in conflict situations frustrated by the cumbersome procedure and delays in methods of resolving conflicts will attempt to resolve their differences without recourse to traditional institutions. A widening availability of legal services entails not only increasing costs, but a rising con-

sciousness of problems, and awareness that their solution rests with legal mechanism. The combination of these facets may ultimately give rise to a demand for the socialisation of legal services. If this demand is to be met with, it may need all the support,[11] 'to move the profession towards a new composition, new tools and renewed dedication to its ideals.' As Bora Laskin explains,[12] important as it is to know what the law is, it is equally important to know what the law is for. The distinction is between a purely formal, mechanical view of the law, antiseptic and detached, and a view of the law that seeks it as purposive, related to our social and economic conditions, and seeking ends that express the character of our organised society. He is not slow to realise that this is not an easy prescription, especially during a time of upheaval. It is also important, as he points out, that the public be made aware of the limitations of adjudication and of the dangers that lurk in looking to courts because of the failure of other social institutions to remedy alleged ills. This warning may well have to be borne in mind when courts can easily be made scapegoats for the failure of other social institutions; there is bound to be even greater confusion and consequent chaos if the courts have to be resorted to, on any appreciable scale, due to failure or malfunctioning of political institutions. The place of the courts, their role, limitations and strength have all to be properly understood, firstly by the legal community itself, and then by the public at large, if the rule of law in a democracy is to be meaningful and efficient. The role and responsibility of the Bar of this vast subcontinent in this respect can hardly be overemphasised.

It is, therefore, important that the Bar also becomes more capable than it has yet been; as the great philosopher Teilhard de Chardin very wisely said,[13] 'to know more, to be capable of more, in order to be more.' The manifold ways in which this is possible would obviously commence from the stage of ordinary general education itself, missing which, at least from the stage of legal education. What is also noticed is that law will infiltrate educational processes, gradually reaching lower levels.[14] Espe-

cially needed for the purpose of legal aid to the indigent are not so much the traditional skills to serve the rich, but qualities of a different kind by 'immersing students in a legal aid setting' which 'may provide a milieu in which a sensitivity to injustice is acquired.'[15]

Another aspect which bears on the capability of the Bar is the formation of groups of lawyers. The practice of law has become so complicated that it is impossible for even the most talented and hardworking lawyer to function in isolation; this is of special significance, in the legal aid context, because it would then be possible for such groups to even staff full-time lawyers for legal aid work, as the recent example of Baltimore in the United States will show.[16] Here is a practical illustration of the meaning to be given to the obligation of the lawyer to the poor as well as the rich.

A legal aid setting might also go a long way in solving the vexed problem of the indigent members of the Bar—unemployment and even under employment—as well.

The opportunities that await the members of the Bar in the matter of participating in legal aid clinics run by universities, or law colleges affiliated to universities, and helping to package field experience for distribution in the classrooms has been dealt with by me elsewhere.[17] The task of building a better legal community and making this feasible from the stage of legal education onwards has to be shouldered in a great measure by the Bar itself. Herein lies a fertile field in which the members of the Bar can make a significant contribution.

Space and time forbid my dealing with so many other aspects as I might have. This problem has Orwellian overtones such as 'poverty and its effect on the spirit and the discrepancy between public demands and private desires'—the problem, in short, is 'what are the livable terms under which private virtue is modified for the public weal?'[18] My purpose is nothing more than to call the attention of the Bar not only to the magnitude of this problem, but also the attitude, in real terms, the Bar can take in this regard with profit to itself and to the cause of justice

which it seeks to serve. The whole exercise is how to make 'equal justice among unequals' a reality.

Notes

1. 'Legal Aid System at the Cross Roads,' *American Bar Association Journal*, April 1973 issue, p.368.
2. *Law and Japan: The Legal Order in a Changing Society*, edited with commentary by Arthur Taylor Von Mehren, 1963, pp.193–199.
3. See the informative article about the Minnesota Program in June, 1973 issue of the *American Bar Association Journal*, p.673.
4. See 'Future of Legal Services,' by H.W. Arthurs and Pierre Verge 1973 *Canadian Bar Review*, p.15, 18.
5. Vol. XI, No.1, 1973, *Alberta Law Review*, p.65.
6. One by Larry Taman and Frederick H. Zeemans and another by H.W. Arthurs and Pierre Verge in the March 1973 issue of the *Canadian Bar Review*.
7. Of that issue.
8. *Law and Morals*, November 1972.
9. *From Proscription to Discovery: Law and Society* 1973, p.7, p.11
10. *Canadian Bar Review* (1973) pp. 35–36
11. p.39 of the *Canadian Bar Review*, 1973.
12. *Function of the Law*, Vol. I, 1973, p.118, p.119.
13. *Human Energy*, p.164.
14. 1973, *Canadian Bar Review* at p.30.
15. David R. Lowry: 'A Plea for Clinical Law,' Vol.1, No.2 (May 1972), *Canadian Bar Review*, pp.187, 207.
16. A legal firm has staffed two full-time attorneys for work in ghettos. See 'Legal Services for the Poor—Meeting the Ethical Commitment,' by Peter Smith and John E. Kratz, *Harvard Civil Rights Civil Liberties Law Review* Vol. 7 No.3, (May 1972) p.509.
17. Materials for Law and Poverty course at the Delhi University (under preparation). See 'Some perspectives concerning clinical legal education,' 1973, *Lawyer*, p.145.
18. *Orwell's Fiction*, Robert A. Lee: Introduction, xii and xiii.

4

Uncovering Legal Space

On the occasion of the Indian Law Institute completing twenty-five years of its useful existence, it may be appropriate to refer to what was articulated on the occasion of the inaugural function of the Institute in 1958.[1] The need for study of administrative law as a separate discipline, distinguished from constitutional law, was acutely felt in our country. This was only natural, in a situation where at least one leading textbook on English constitutional law had expressed regret that the liquidation of the British empire had only resulted in having an additional chapter on administrative law in that text book.

History provides us with the experience not only of the better known French *droit administratif*, but also the lesser known West German separate administrative courts system with an Administrative Supreme Court at the apex. Administrative law in Germany has shown a remarkable continuity of growth and performance for nearly a century and a half, despite setbacks during the Bismarck and Hitler regimes. This has to be appreciated in the overall context of the commercial and civil law courts existing separately, and the complex jurisdictional boundaries between them. Most European countries have, in addition to the regular chain of usual courts—criminal and civil, a number of specialized courts. Even the labour courts are often like boards of arbitration, staffed by a mixture of business and labour representatives and professional judges. It is a serious question whether

this kind of structure, with suitable adaptations, may be appropriate in the Indian subcontinent.

The need for a regular system of administrative law was felt on the American continent almost throughout its history, but it was not until 1946 that the Administrative Procedure Act was placed on the statute book.

India also adopted the separation of powers doctrine, and has given itself a written constitution, nearer the American model. It was inevitable that it also became involved with administrative law. It redounds to the credit of the Indian judiciary, some aberrations notwithstanding, that it has graduated in this area much sooner than one might have expected. This was not a little due to the vision and courage of judges like Justice Hegde, who gave us *Kraipak*,[2] sweeping away, by one stroke of pen, the nuclear and foggy distinctions that bedevilled the English scene for so long, especially concerning whether the act was merely administrative or quasi-judicial, for the purpose of issuing the high prerogative writ of *certiorari*.

A knowledgeable American scholar, Professor B. Schwzartz, has drawn attention to how a wrong understanding of the English writ of *certiorari* at the turn of this century, by the American Supreme Court, led to the deployment of more modern juridical tools like injunctions, declarations, etc. But it is not at all surprising that at least one of our Supreme Court judges, brought up in the conservative Anglo-Saxon mould, out-Heroding Herod, went the length (not withstanding later English decisions to the contrary) of doubting the correctness of *Kraipak*; fortunately for the Indian public, this scepticism did not make any dent.

On the contrary, the Indian approach, not only to administrative decisions *simpliciter*, but what is now emerging as 'Public Interest Litigation' (PIL), has become a 'benchmark' on the Indian legal scene. Some of the aspects have been discussed at length by Justice Bhagwati in *S.P. Gupta and others v. President of India and others*.[3]

But this approach has not escaped criticism from the tradition-bound lawyer and/or judge, who feels completely insecure when his umbilical cord, fastened to the placenta of Anglo-Saxon legal culture (which alone has sustained and nourished successive generations of lawyers), is attempted to be severed. The usual run-of-the-mill lawyer/judge being left with little else besides, there has been a resultant *anomie* in our legal culture. This is due to a lack of sufficient awareness of the kind and dimension of challenges to our legal system and not much thought having been bestowed on the demands upon it and how they have to be met. The average lawyer/judge, barring honourable exceptions, does not seem capable of the quality of sustained public-spiritedness, as distinguished from mere occasional flashes in the pan, which alone can motivate him to acquire the needed expertise continuously for meeting with growing challenges. An acute trauma has been the sad result.

Any sudden exposure to not only quick but multidimensional changes can leave scarred tissue behind, necessitating the application of massive doses of balmy and constructively original approaches. One such avenue, among possible ones, is the strengthening of the judicial voice along the 'abuse of discretion route.'[4] In essence, it would be a kind of work so comprehensively sketched by Kenneth Culp Davis in his very important but long neglected work.[5] Davis had explained the need to work on the more difficult areas to which no attention at all has been paid, rather than rest content with improving a little portion covered to some extent at least; he wanted attention paid to the urgent task which he describes as having to 'structure, confine and check' administrative discretion, without which there could not be optimal judicial review of administrative discretion.

An important object lesson in this field, however, is the English experience (which we have sought to 'bury' in many ways but still 'haunts' us from the 'grave' to adapt what Maitland said in a different context). At the heart of the English approach has been the now almost worn-out concept of jurisdiction to decide, including jurisdiction to decide wrongly. This ghost was

attempted to be slain by the House of Lords in *Anisminic*.[6] Lord Denning explained later in *Pearlman*[7] the distinction between an error which entails absence of jurisdiction and one which does as being very fine; so fine, indeed, that it is rapidly being eroded. The suggestion that there was 'jurisdiction to decide wrongly and that this was done,' was summarily brushed aside by him: 'I would suggest that this distinction will now have to be abandoned.' After being rebuked, as it were, by Viscount Simonds for his having attempted to fill perceived gaps in a statute by judicial construction, he referred to his recent continental experience, when he heard continental lawyers speaking freely about 'teleological' and 'schematic' interpretations of statutes—expressions still strange to English lawyers and judges!

A high-water mark had been touched earlier by English judges in *Tameside*.[8] An Act of Parliament had allowed the minister to interfere with the decision of a local authority when it acted 'unreasonably'; this was held to include a power to interfere with the decision of the minister, who did not merely agree with its policies, or thought that was not the best possible policy to adopt. The English judges, therefore, are now reasserting (not only for the first time, as it is mistakenly supposed) the doctrine that judges must use the most permissible standard of reasonableness in dealing with the policy judgments of the government.

Though these decisions have not been actually referred to in *Maneka Gandhi*[9] by our Supreme Court, we find an echo of such thinking while expanding the frontiers of Articles 14, 21, etc. The frontiers of Article 32, in conjunction with Article 14 in particular, are waiting to be explored further.[10] Professor Wade has referred to some of these refreshingly new approaches of English Judges.[11]

Robert Stevens[12] has done yeomen service by covering the whole gamut of English decisions in this area, in particular the changing role, as he sees it, of the House of Lords during 1800–1976. He quoted the lead article of the *Times*, dated 28.6.75, which intoned, 'thank God for Lord Denning,' while writing about Lord Denning's unique contribution.[13]

Michael Zander[14] has also dealt at length with the specific contribution of Reed Dickerson in this respect. It seemed to me, when I read through Reed Dickerson's *Statutory Interpretation and Application of Statutes* that it was the best contribution so far made in the matter of understanding, in juristic terms, the interpretative process. I was happy to find that Zander also thought so. Dickerson has drawn attention to several seminal aspects covering both the concept and practical operation of the judicial process involved in the interpretation of statutes, which Lord Wilberforce has described as a 'non-subject', probably meaning, thereby, that the subject is not a taught one. Dickerson deals with seven type-situations of interpretation.[15] Summarising what he says would not do justice to the refreshingly new insights he shares with us. I should not, however, fail to draw attention to what I regard as the most distinctive among them. The lawmaking that judges indulge in while interpreting statutes is of even greater importance than what happens now under the guise of delegated legislation. Other scholars have highlighted the massive shift of power that has and is still taking place, from the Parliament to the executive. What this really means to the judiciary and judicial independence seems very important and urgent to understand. We now know that, despite the great struggle of English judges to maintain their independence, there is evidence, now and again, of their abject surrender to the so-called sovereignty of Parliament. This has brought, in its wake, the need to curb executive abuse, and even tyranny sometimes, especially those which seriously jolt the rule of law. This needed corrective can come only from the judiciary in a democratic rule-of-law section.[16]

An important difference here is that delegated legislation does not automatically become law (for it can be declared *ultra vires*), whereas what is decided by judges does, unless overturned by superior courts, or when there is express later legislation getting rid of it.[17] This sets practical limits to what legislation by a steam roller majority or an executive having legislative support can do.

It is not rare to come across decisions of courts, even those rendered in the public interest, being expressly overturned by statute. It happens sometimes, however, that some bills of this kind are not passed for long periods after they are introduced.

Anyone researching to uncover legal space will learn immensely from such situations.

A typical and well-known example, of juridical technique under the guise of self-restraint, but bordering on self-abnegation, of judges withdrawing themselves from issues of even momentous public importance—under cover of the expressed phrase, that 'the appeal should be to the ballot box but not the court,'—would only show that while a judge cannot act contrary to the express language of the statute (a black and white situation), there are still many grey areas crying for further exploration. Such continuous withdrawal or self-abnegation, so far had probably much to do with the lack of sufficient awareness and the needed expertise. Such withdrawal has doubtless great social, economic and political costs. In quite a few type-situations at least, it has been plain shirking of judicial responsibility. There are many political questions which are, in the ultimate analysis, constitutional ones.[19]

Equally are there many challenges to democracy from the economic angle, especially where the economic ills are due to politicisation; the obvious remedy in such cases may be judicialisation to the extent feasible.

It seems to be, therefore, of the first importance that future legal research should lie in the direction of not only uncovering legal space, strictly so-called, but related political, economic and social space as well. It may be true to say that no legal question could, hereafter at least, be viewed in isolation. In the area of public administration, the rot which has set in since independence has not even been seriously attempted to be stemmed. Arbitrariness seems to be the rule rather the exception. The idea of grievance-men/ombudsman/*lokpal* has sunk to the very bottom; all talk about it seems to have the effect of only burying it deeper and deeper—like what happens in quicksand. It is in the

above situation that the Supreme Court (at least a few judges there) has courageously taken upon itself to face the challenge caused by mal-administration with the new tool (technique) of 'Public Interest Litigation'. I learnt firsthand about this when I was in the United States in 1978. I have since been addressing the Bench and Bar of the country on this subject for quite some time. I am, therefore, personally happy that this has caught on; it is not surprising, however, that this should have caused both euphoria and cynicism.

The American experience in this regard teaches us that we have to be both adventurous and cautious in this respect. In any case, one cannot scoff at these incipient but heroic efforts. One has, I suppose, to keep on learning, mostly by doing. This is an area where research can help greatly. The results achieved in such a short time have been nothing less than stupendous. The further efforts will hopefully lie in the direction not of scorching this glorious effort, but supplying the needed correctives, infrastructures and, more than all, creating the needed consciousness; that we should have a government of laws and not of men; that the judiciary is an indispensable ally.

What emerges from the concept of PIL, therefore, is not merely the need to promote access to the legal system (which is what legal aid is concerned with) but to ensure that such 'representation' is efficient. As Burton Weisbrod[20] pointed out, if the concept of 'market' and 'efficiency' are the watchwords of the economist, the watchwords of the lawyer should be 'representation' and 'efficiency'. Gary Bellows of Harvard,[21] who has considerable experience in handling courses on legal aid, stresses the need to know a great deal more about what he calls the 'lawyering process' itself. Surely, these are the areas for future research. A useful analogy is what happens often in most public hospitals, which one dreads to enter unless compelled by poverty or emergency. In our country, so vast but still so poor, it will be futile to think of providing legal aid in all cases where it is needed; our resources are so inadequate. This very attempt only raises expectations, which cannot be fulfilled. Class Ac-

tions and Public Interest Litigation, therefore, become compellingly urgent. These are some of the gross deficiencies in our legal system. The Supreme Court has been struggling heroically to make up for only a few of them.

It is sad that this has not percolated to the extent it should have been: the next lower level—namely, the High Courts, not to speak of the still lower courts. *Why?* The legal community, unfortunately, is still by and large not sufficiently involved. But why is the legal community so indifferent, or even apathetic. The possible answers might be many, but foremost among them may be the lack of awareness and sensitivity due to the lack of proper legal education, non-acquisition of needed skills, etc. The only way we can find out is by ongoing research of an appropriate nature. A perceptive and knowledgeable performer in this area of PIL in the United States, Ralph Nader,[22] lays the blame on the kind of legal education there is even in that country; students are not yet taught what they should know to equip themselves for these tasks; the legal education itself should be suitably restructured. I wonder what Nader might say of our legal education.

Where does all this lead us?

The constellation of features which require to be investigated might fall under the broad and compendious expression 'Public Law'. Apart from what is usually described as 'public interest' in public litigation, we are now perceiving a public interest in private litigation as well. To many of our legal brethren, this may (or does) still sound strange. Inequalities in the allocation of legal resources are no less shocking, or at least disturbing, than inadequate allocation of economic resources, in a situation of severe shortages. Administrative justice is a new contender for equitable distribution. The free market theory for the provision of legal services has failed much more shockingly than the economic free market. The adversary system has doubtless acquired a certain amount of perfection, but this has been at too heavy a cost of neglecting the widespread need for legal services. It is time that we began to explore alternatives:

more efficient and speedy settlement of disputes, for which the adversary system has proved to be too expensive and too costly. Defence of an important right belonging to a significant segment of the public, but totally neglected hitherto by our adversary system, cannot still be left neglected, owing to our smug and complacent belief in the efficiency of our much too exclusive adversary system—which has only prevented rather than promoted access to it. Procedural and structural deficiencies have taken their heavy toll on the Public Interest Law movement. Learned Hand's injunction, 'thou shall not ration justice' had gone practically unheeded for too long.[23] We are greatly worried today over maladministration, not merely generally, but in the specific area of the allocation of legal services. The question posed is whether the availability of legal service depends on wealth rather than on need.[24] The new consciousness is that we deserve the security and dignity of our profession only if we satisfy the public's need for adequate legal representation.[25] Law schools have taught its students for too long only the fear of making mistakes. This is despite the warning administered by Jerome Frank that asking for a greater certainty in the law than what is possible in life is only a kind of 'father-fixation'.

Newspaper readers today are not only left utterly frustrated by reports of a serious breakdown in law and order, but also about impure drinking water and unsafe products, about skyrocketing utility bills and corrupt politicians, and they feel that they can do nothing about it.[26] Our involvement with legal aid so far—with all its deficiencies—has taught us that legal rights for the poor may prove only an inadequate starting point for increasing social justice. We also have learnt that 'ferment can be quite effective in the profession.[27]

Most of these writers, and a host of others, highlight the need for research in the area of Public Interest Law. This will include not merely legal aid, but legal education; not merely combating maladministration in the conventional sense, but also mal-distribution of scarce legal resources.

Note

1. See, for proceedings and report of the seminar on research topics (14-21 December 1957), 1 *J.I.L.I.*
2. *A.K. Kraipak v. Union of India*, A.I.R. 1970 S.C. 150
3. A.I.R. 1982 S.C. 149, popularly known as the *Judges' Transfer case*. In *People's Union for Democratic Rights v. Union of India*, A.I.R. 1982 S.C. 1473. The concept of public interest litigation, especially on behalf of the weaker sections of the community, registered a still further advance.
4. The felicitous phrase is that of Martin Shariro in *Courts*, p.117.
5. *Discretionary Justice* (1965)
6. *Anisminic v. The Foneigh Compensation Commission and others*: 1969 (1) All.E.R. 208
7. *Pearlman v. Harrow School Governors.* (1979) Q.B.56.
8. *Secretary of State for Education and Science v. Tameside Metropolitan Borough Council* (1977) AC 1014.
9. *Maneka Gandhi v. Union of India*: (1978) 2 SCR 621
10. *Food Corporation of India v. Union of India*: (1978) 2 SCR 54
11. Prof. Wade Hamlyn Lectures: 'Constitutional Limitations'.
12. *Law and Politics.*
13. See pp.488–505.
14. *The Law-Making Process.*
15. Chapter 13, pp.238–261.
16. The question, 'Who will judge the judges'?—not at all an irrelevant one by any standard—can be answered only in the background of a mature legal culture, which is both responsible and responsive, presupposing the independence of both lawyers and judges. On the latter, see the author's contribution to the ex *Journal of the Bar Council of India* (1982) Vol.IX, pages 365–396 entitled, 'Non-Consensual Transfer of Judges.' If salt itself loses flavour, who can salt the salt?
17. This will obviate, at least to a great extent, the need to be overly worried about the kind of distinction which Prof. Wade, for instance, seeks to make between executive and quasi-judicial decisions which are merely voidable or void.
18. Also vice-versa.

19. *Public Interest Law*, edited by Weisbord, contains his own contribution.
20. *The Lawyering Process.*
21. Vol. II, No.2 *Law and Society Review*, special issue (1976), 'Consumerism and Legal Services: The merging of movements,' by Ralph Nader pages 247–256.
22. The Equal Foundation, 'Taking ideals seriously: The case for a lawyer's Public Interest Movement.'
23. See, 'The Inequalities in the Allocation of Legal Services; the Maladministration of Legal Services,' by Philip Stern.
24. See Joel Seligman, *The Misdirection of Law Schools.*

5

Legal Education

AT A SEMINAR on legal education, Prof. Myers McDougal had suggested that at base the problems of legal education are the same everywhere, but Prof. William Twining,[1] while agreeing that there was a core of truth in it, claimed that the emphasis was wrong; he detected a tendency in the conference to readily accept the international vocabulary and rhetoric of legal education, the international conceptions of its problems and the currently fashionable international prescriptions for resolving them—especially in the matter of diagnosis of the precise nature and scale of our problems. He lamented the absence of sufficient thinking concerning manpower planning, the changing legal profession, the career patterns of law graduates and the economics of higher education—in short, the specifics of the Indian situation. He rightly urged that we invent some of our own devices, to think big. Foreign models, he pointed out, are usefully suggestive, but sometimes they are a dangerously seductive substitute for detailed analysis of the specific problems of the local situation; it is not enough that we be merely warned of the dangers of over-sophistication in prescription of remedies, but we must also beware of the equally great danger of oversimplification in the diagnosis of what the problems are.

Prof. A.T. Markose[2] was even more forthright. After quoting from the Kerala University Commission Report of 1964, to which, at his kind request, I was a party,[3] he urged[4] that we

forget for the time being the level of instruction which the 'Law, Science and Policy' ideal, which very affluent advanced nations who aspire for world leadership can have for themselves. The objective of legal education, he concluded, is the imparting of professional skills to lawyers.

Prof. Markose has been more of a performer on this theme of legal education for a longer period than myself, who have had the privilege of being with him on several such occasions. I can, therefore, personally bear witness to his deep and abiding interest, during the dozen years that have gone by, in the interlinking of law with other disciplines to the extent possible, to his keenness on increasing not only the quantum of subjects taught and learnt at the undergraduate level in legal education, but also the quality of instruction. One kind and knowledgeable friend, Prof. Arthur Taylor von Mehren, who has been sharing with us so ably and enthusiastically our labours in this regard, hopefully considers the coming dozen years as even more significant, but warns it is a more difficult period.[5]

Not being a professional teacher myself, but having only some brush with law teachers and law teaching, I fully share Prof. Markose's sense of disappointment. I take it that it is his disappointment which has induced such thinking that sounds somewhat narrow. The purpose of this paper is to record, in brief, my own reactions to the evolution of our legal education in recent years, as I read through the well-edited (by Prof. S.K. Agrawal) proceedings of the Poona Seminar,[6] in the background of my own humble contributions.

It must be truthfully acknowledged that the three-year curriculum, as some of us conceived of it, has not been worked, generally, in the manner we wished. When some of us were summoned in 1963 by Dr. Gajendragadkar to chalk out the curriculum of the Delhi Law School, we were enthralled by the prospect of having to deal with handpicked students, who would be fully engaged in the study, as their competent teachers would be engaged in the teaching, of law. This dream has been short-lived. Even at Delhi, which I thought started well, the way in

which the three-year curriculum is being worked has been far from what is required, the programme has at least been submerged by an increasingly unmanageable number of students. At Banaras, which I visited on behalf of the University Grants Commission, the student body has not been what we might have wished, despite our high hopes.

My own pedestrian efforts at the Law College, Madras, to upgrade the quality and content of legal education were not quite successful. To overcome the shortcomings of the then two-year course at Madras, I visualized a series of courses by way of postgraduate in law specialization. I was, however, gratified, to start with, with a more superior than previous level of student body (carefully chosen) who shaped rather well. But before these courses could make a dent on the consumers of these products (some of whom I exhorted to consider for gainful employment at least the best ones for their requirements, in respect of several law jobs) I was myself out of it; the three-year courses had helped extinguish some of those feeble embers.

Not that I even pretended that these courses were the panacea for the inadequacy and unreality of our legal education. It seemed to me that it might take very long for legal education to pick up generally in this country, and that instead of waiting for that happy day to dawn, a series of experiments, at least to put through bread and butter courses, in order to make the students more competent professionally in various practical fields, may be offered.

If such efforts had borne fruit, in the way I dreamed of them, we might have had our own indigenous experiments to talk about and to learn from. Prof. Bertram Wilcox, who heard me explain my efforts at one of the Kasauli Seminars, was kind enough to say that he regarded the Madras experiment as significant, and referred to similar efforts in the United States. It has been my confirmed view that a uniform pattern of legal education may not be convenient without manpower requirements, nor even fit for local situations. Even in the field of postgraduate education in law, I have been having courses in subjects,

which each University was most suited to offer in terms of its manpower, and suggested a kind of coordinated effort on the part of some of the Universities in the south, the faculties of several of which I had the honour and privilege of advising. Much as I had missed it myself as a student—the interdisciplinary approach—I would have wished that at least at some higher level than the undergraduate, and at least for a select student body, a beginning in this direction could be made. But even here we have been terribly short of not only manpower and other resources, but even the needed imagination to back it.

It is a prominently characteristic feature of our national life that our talk, in various disciplines, seems to be highly sophisticated, but coming down to execution of even some of those ideas, we seem to be rather poor in follow-through action. One remedy for it has been suggested by Prof. Markose—as I take it, in sheer desperation—that we lay aside, at least for a time, such highly sophisticated approaches to legal education and pay more attention to brass tack-levels of improving professional competence. As he put it in his own characteristic way, 'We will be complacent with a situation which supplies us with plumbers to start with. With passable architects we will be tolerably happy'.[7] He is not (nor can any thoughtful person be) unmindful of the need to which Marc Gallanter referred,[8] that much of the solution to the problem of the Indian lawyer adapting himself to contemporary social needs demands of him, falls on the capacity of the Indian legal education to impart the needed skills and attitudes.

Common sense dictates that we may do with a passable kind of undergraduate legal education, which will not be so overloaded as it is now,[9] but which will carefully select seeds of growth. At least at a later level, some of the better students, after spending more time than may perhaps be necessary if they are straightaway exposed to it, may go further than now seems possible. We can do this by addressing ourselves to not more than perhaps five per cent out of the great number of students, leaving the rest practically untouched. It seems so necessary to

separate sheep from goat. Out of a mass of students, such separation seems impossible, as some of my own bold experiments in this direction—by hindsight, foredoomed to failure convince me.[10]

I am only making a plea here for taking into account, realistically, certain factors which cannot be glossed over merely on account of our excessive zeal for a better kind of legal education than yet seems possible, at least at the undergraduate level. In this view, it may even be a matter for deep consideration whether the curriculum cannot more profitably be confined to two years, postulating a kind of more intimate course, of even a longer duration, if necessary, at the post-graduation in law level. In fact, those wanting to take to research or teaching may think of the Master's course; other degrees, of not less than two years after graduation in law, may also be offered to those who do not wish to teach, in many fields like company law, taxation law, labour law, administrative law, etc. For handling this, even part-time lecturers and/or suitably arranged special lectures, drawn from the top men in the profession in respective fields, may be secured or arranged. In the area of administrative law, for instance, no course at the undergraduate level (which should be, and has fortunately been, made obligatory) can possibly comprise much that can be attempted only later.

My own brief experience, handling a large number and variety of petitions at the Delhi High Court, convinces me that the problems of judicial review are becoming increasingly complex; the common run of lawyer has no adequate background, and is unable to give needed assistance to courts. He may not be able to give such assistance, generally speaking, unless he has the benefit of intense courses handled by professional men of real calibre—this seems to be a field (unless I am grossly mistaken) where the professor who has locked himself in his library (which is no doubt indispensable) may not be able to do as well as one going back and forth from the university to the field. For the bulk of law teachers, however, the source has to be from those who have at least taken a Master's degree, and those who

have gone further by taking a Ph.D. and produced really worthwhile research papers. Research and teaching have to go hand in hand; this seems to be the only means by which not only can the teacher be constantly growing, but we would also be creating the conditions so necessary for a continuous and ever improving base for the supply of future teachers. My feeling that the general level of law teaching (though a few good teachers have emerged) has not visibly improved during the past decade. Judging from a few samples of students appearing for the Master's degree that I have had, from some universities, I do not think that the level of students at the Master's level has appreciably improved in the past decade.

My purpose is not to be critical—it is only to draw lessons, of a realistic nature, from our performance during the past decade. My regret is that in spite of so much work done so far, the results have not been what they should have been. The most regrettable thing is that the teachers have not even been able to produce the kind of teaching materials required.[11] As I said on more than one occasion,[12] we have fortunately with us at least a few who have the competence to produce such materials, which may be a springboard for further efforts, but the pity of it is, this has not happened yet on any worthwhile or significant scale. I am not able to see how teachers may like to rest merely on their past laurels, and not continuously put out their best. I have pointed out elsewhere[13] the example of Prof. Richard Zeyman, a Nobel Prize winner in Physics, taking the needed time off even from his research to write three volumes of freshman lectures.

The problem of how to improve higher education, so that the product who takes to courses in law would be able to better engage himself in legal studies, is not one to which I can allude in the course of this brief paper. This has to be attempted on a big and even more fundamental scale. But I am, for the present purpose, willing to start with the kind of human material that is currently available. It seems necessary to redefine what should be the scope of the undergraduate course, without attempting

an excellent blueprint on paper alone. It also seem to me, as I hope it will be to those who give this problem some thought, that what is required today is a realistic beginning, which will take due note of all our limitations as they exist at the moment, not excluding general student apathy to learning.

I am all for centres of excellence; they cannot be dispensed with. The need for such centres of excellence led Dr. P. B. Gajendragadkar to advocate at least a few National Law Schools, about a decade ago. It seems that the possibility of such efforts has been somewhat inhibited (apart from other difficulties) by the greater talk about more broad-based but worthwhile undergraduate legal educational courses for all. Such centres of excellence are also necessary to provide full facilities for continuing legal education at all levels—for lawyers and even judges at various hierarchical levels. I have referred to this theme on so many occasions; I shall not, therefore, repeat myself here. I may usefully call attention to Dominic R. Vetri's excellent article 'Educating the Lawyer: Clinical Experience as an Integral Part of Legal Education'.[14]

But I do wish to refer here to one aspect of legal education, more than everything else, not that I minimize in the least pedagogic techniques like the lecture method, case method, seminar, moot, etc. and combination of these pedagogic tools for classroom instruction. I wish to draw the attention of those not yet familiar with it to the kind of legal aid clinic that is being used as a pedagogic tool, 'clinical pedagogy', as it has been described. I have myself been writing frequently on this theme.[15]

There have been a significant number of universities in the United States—about eighty according to a fairly recent report,[16] which have launched programmes of clinical legal aid. Such experimentation has been on a fairly wide and intense scale during the past about half a dozen years. There is strong support for these programmes from a significant section, which is fairly disillusioned with the inevitable repetitiveness of the current courses of even three years' duration. Yet, it is what one writer[17] has aptly described as 'a new ball game in a new game

park'. The US tradition of legal education, after the victory scored by academics like Prof. Langdel over the profession in rescuing legal education from professional control has naturally not been in favour of this experiment.

Ideally speaking, however, the best approach to these programmes would be a willingness to evaluate them in terms of their sheer usefulness as a necessary adjunct to the present legal education, in order to get over some, at least, of its major deficiencies; any approach to this question, therefore, has to be free of the overtones of possible rivalry between the practising and teaching wings of the legal profession, but has to be based positively on their mutual cooperation.

In the Indian context, it seems that this programme might serve as a useful device to engage student interest more actively, and even to provide a constructive outlet for student idealism. There are many queries which arise with reference to these programmes and they have not been fully answered yet.[18] But one may not have to wait till all such queries are answered; they will not only be answered but many of the difficulties met with, as and when more and more experience is gained in running these programmes. The objection, however, on the ground of these programmes not as yet being curricularly manageable, may not be quite valid for the reason that the law itself has now grown to curricularly unmanageable proportions. Devices outside the conventional framework of traditional teaching, have, therefore, to be thought of and invented. It seems clinical legal aid as a pedagogic tool may be very important among the new devices.

The programme of legal aid is bound to be worked on a measure and scale hitherto unknown in our country.[19] The working of this programme by the Delhi Law faculty, on a very modest and insufficient scale, has served to highlight several problems. Chief of these are that there has to be a considerable amount of expertise developed in the matter of student supervision by the faculty of such work, and packaging field experience for classroom distribution. Our teachers of law are, by and large, still

not yet trained to handle such programmes. Their cooperation with the practising lawyers, and the willingness of both lawyer and teacher to learn from each other and from the experience gained, would indeed appear indispensable. The necessary climate for this kind of a cooperative effort on the part of both the wings of the profession, teaching and practising, seems indispensable to the success of this programme.

Such programmes undertaken by universities are without doubt bound to be socially ameliorative, but mere social amelioration is not the essence of these programmes. Among the important objectives are: (1) student exposure to problems of poverty in this area and increasing student sensitivity to injustice due to poverty; (2) acquisition of sufficient expertise in dealing with indigent clients, because the problem of the indigent client is not the same as the problem of a client temporarily without money; familiarization with the rules of the ordinary procedure of the court and strategy, with a view to realistically evolving techniques for combating superior strategies evolved by the better-off litigant against his poor adversary, etc.; (3) to provide paralegal bases for legal aid programmes; (4) to help the student, at least during the later portion of his academic career, to evolve as a responsible member of the profession, and to be recognized as such by the profession, so that he may be in a real position (not merely nominally) to assume full and adequate responsibility for professional work when he passes out; (5) to help establish a real and effective area for legal research, in the light of the difficulties encountered by the poor litigant in a system hitherto heavily weighed towards expense, both in terms of money and time, and thus really transform this into a movement for the much needed legal reform, about which there is as yet more arid talk than practical action; (6) in short, to help building through the instrumentality of the law a more egalitarian society, rather than allow it to be employed for purposes of exploitation.

Apart from helping achieve these wider objectives, the more immediate gain would be a more significant legal education.

This by itself, will promote student idealism to such an extent—in greater and greater measure as the programme gains momentum—as to achieve the aim of more student involvement in legal education itself. As yet, there appear to have been only two sets of people: (1) those who will rise above their education, however bad, and (2) those who will never internalize the lessons placed before them, however good the presentation. Clinical exposure may help, the law scholar's capacity to reach the deeper motivations of the students and, thus, to influence their careers. There would be many more advantages flowing from these programmes which it has not been possible, in the course of this brief article, to list.

Unlike many other countries, for instance Japan,[20] we have not only a fairly large legal community, but also a very long professional experience from which we can more usefully learn lessons; we can also learn from and profit by the experience of others. We may usefully remind ourselves of what a Chinese philosopher once said: study without thinking is vain, thinking without study is pernicious. Even more usefully, we may remember another old adage which has probably lost meaning by repetition: an ounce of practice is worth more than a ton of theory.

Notes

1. *Legal Education in India: Problems and Perspectives*, edited by Dr. S. K. Agrawal, pp 425–26.
2. *ibid*, pp 21–27.
3. *ibid*, p. 21. 'The object of legal education is primarily to create professional lawyers'—which expression includes 'all persons trained in law whose employment is mainly dependent on their degree in law.'
4. op. cit. (2), p. 26.
5. op. cit. (1), pp 428–29.
6. op. cit. (1).
7. op. cit. (2), p. 26.

8. Special issue of the *Law and Society Review*: 'Lawyers in developing countries, with special reference to India' (3 L & S. R. parts 2 and 3, February 1969, pp. 216–7).
9. I regret, in the light of subsequent experience, some of the decisions to which I was a party when I was less knowledgeable but merely enthusiastic about rapidly building a better legal community.
10. Among my experiments was the effort made to ask every student to describe, in a *pro forma*, his own interest in legal studies and the extent to which he would like to make use of some of the facilities offered by way of experimentation, to upgrade the quality of instruction and group them in separate sections, according to such disclosed interest. Seats were also numbered in each classroom, the size of which was reduced greatly because the teacher would, without wasting time by calling their names every hour, merely make a note himself of empty seats. This was meant not merely to ensure greater student attendance, but to make the assessment of every individual student by the teacher (thus preparing the way for greater internal, as opposed to external, evaluation) possible. The latter was resisted because it checkmated attempts to cut classes, which has almost become a tradition; the former also was not fruitful, because even without putting in the needed effort, every one wanted to be treated at par. At least some of these deficiencies could be met to a great extent by recruitment of high quality teachers, who may be able to hold student interest more successfully, but, in practice, availability as well as difficulty in recruitment of such teachers on the existing salary levels, make this approach practically unavailable.
11. We began talking so much on this matter at least from the Mount Abu Seminar held about a dozen years ago.
12. At the recent conference of law teachers in Delhi, as well as at a more intimate and deep level at which this problem was discussed at the Law and Social Change Seminar organized under the combined auspices of the Indian Council of Social Science Research, by the Law Commission and the Bar Council of India.
13. My paper on 'Research in Legal Education', *The Third Indian Year Book of Education*, Published by the Ministry of Education, pp. 214, 222.

14. 50 (1970) *Oregon Law Review*, p. 57.
15. (1973) *Lawyer*, p. 145—'Some Perspectives concerning Clinical Legal Education': 1963 *Bar Council of India Journal*, 'Equal Justice among Unequals'. Introduction to one part of the Materials for Law and Poverty Course at Delhi University (under preparation).
16. The University of Chicago Law School, *Conference Series* No.20, edited by E. W. Kitch.
17. Op. cit. (16): Prebb Stole: 'Clinical Experience in American Legal Education', p. 54.
18. These have been discussed at length in various contributions in op. cit. (16). See in particular the following: Edmund W. Kitch, 'Clinical Education and the Law School of the Future'; John M. Ferren, 'Goals, Models and Prospects for Clinical Legal Education'; John P. Wilson, 'Clinical programmes at Boston University Law School'; Martin P. Cohen, 'The Law Office as a Law School: Two Experiments in New York City'; Edward Barret, 'The Law School Training in Trial Advocacy'. Also see: Arthur Murphy (Visiting Professor Delhi University), 'Legal Aid and Education' (to be published shortly as part of the teaching materials for the course on Law and Poverty at Delhi University).
19. See my article, 'Equal Justice among Unequals', 1973 *Bar Council of India Legal Journal*; also see Dalveer Bhandari, 'Clinical Legal Education: A Necessity for the American and Indian Law School' (to be shortly published as part of the teaching materials for the course on Law and Poverty at Delhi University).
20. Prof. Arthur Taylor von Mehren, *Law in Japan, Commentary*, p. 190: 'Western law introduced in Japan during the last decades of the 19th century'; even then the approach to dispute was mainly of mediation or adjustment. The later aspect may well be worth study by us, for without adequate devices for out-of-court dispute resolution, our already growing-under-the-weight-of-backlog courts may still further be submerged and crack. See also: Yasahir Tarrigachi, 'Problems of Undergraduate and Graduate Legal Education in Japan': op. cit. (1), pp 112–122.

6

Law and Morals

We must combine justice and power, making what is just strong, and what is strong just. —Pascal

I AM UNDER a deep debt to the Bar Association of India for the stimulus this kind invitation of theirs to read this paper has afforded me, to study and think over once again this difficult but important subject, namely, the connection between law and morals. In the Indian scene, it has become even more difficult to discuss the theme. The language of Hindu thinkers shows a preoccupation with *dharmic* notions; religious elements oftentimes get mixed up with notions concerning justice and morality.

It is difficult to eschew reference to the meaning of *dharma* or even broad references to philosophical inquiries concerning morality and ethics. I do not propose, however, to concern myself here with public interest in private morals. The subject being so vast, I shall concern myself mainly with the rule of law *vis-à-vis* moral indolence in a democratic society. In order to conserve time and space for what I wish to say on this occasion, I do not propose to enter into aspects such as the law's concern with homo—or heterosexuality between consenting adults; sexual fidelity in monogamy; making of divorce easier or more difficult; the sanctity of the written word in contracts; liability without fault; whether while punishing a criminal it is a concept or

a person we are dealing with; attitudes towards abolitionism, obscenity, pornography, corruption, etc.; towards criminal law enforcement generally, and sentencing of criminals in particular; towards the right of privacy; the law's concern with whether there should be an attitude of paternalism exhibited by or through the law to moral questions in the accepted sense of the term; or even whether the law can properly concern itself with making people good, except to punish them for being bad, or prevent them from becoming bad. Enough ink has been spilt on these questions already.

Having to discuss this theme in the Indian context, it may be convenient to commence our discussion by referring to Kane,[1] who points out that there have been several transitions in the meaning of *dharma*; ultimately, the most prominent significance came to be attached to the privileges, duties and obligations of a man, his standard of conduct as a member of the Aryan community, as a member of the caste, and as a person in a particular stage of life. If one reads the message of the *Shantiparva* of the *Mahabharata* as Kane does, freedom of will is postulated for a man during his present existence to lead a good moral life and perform meritorious acts, subject to the limitations caused by the environment in which the present existence is cast. The important working belief is that one has free will and that one is free in one's present existence to mould the future, so far as one is concerned by meritorious deeds. The caste system, or *varnashrama dharma,* created no impediment, therefore, to such achievement. The original scheme of *varnas* was natural and based on the work men put in for the community. There was no attempt to secure competitive equality; the interest of all was regarded as identical.

Anthropologists help us see clearly that man is essentially in action; that is one of the characteristics of his time-bound existence. He is both the creator of culture and is the product of it; neither as creator nor as product is he unrelated to nature. Since he lives in a cultural, self-created environment, he cannot be adequately understood without understanding this feature.

Culture is, in the ultimate analysis, a realization of values by human beings. Every individual life has meaning not only to himself but also to the rest of mankind. Anthropology has thus contributed a great deal to our understanding of man; it brings out that there is no culture without its intrinsic problems; to live without tensions will be the death of that culture.

Distinctive patterns of life or subcultures in relation to occupational roles are what may be termed role-specialization. The occupational ethic, as Emile Durkheim points out, requires that the occupational group must always have relations within the framework of economic life. In Hindu society, work became occupational in character and occupations became the chief basis of social stratification.[2] Hinduism employed the occupational role factor as a model for social and religious values. This was the achievement of an esoteric priesthood, which set itself apart from the rest of the society to remain ritually pure, the Aryan society effectively believing in the efficacy of prayer. The priest became theologian, philosopher, lawgiver and statesman, which gave him a position of pre-eminence, even over the *Kshatriya* nobility. Division of labour meant social cooperation, social bonds between men in society.[3]

The economic system of a society endeavours not only to meet antecedent wants, but also generates human wants peculiar to itself. The same is true of any value, economic or otherwise, which is already present in the legal system, or which it tries to achieve; new values are also generated in the very process of the functioning of the legal system.

What may be relevant in this context is the thesis of the French jurist Leon Duguit,[4] a social functionalist, for whom the top value was social solidarity and social function. Since there is a state of mutual dependence among members of society, we ought to fulfil our functions in society; this is based on the principle that those who profit from society ought to fulfil functions useful to that society.[5] Arnold Brecht[6] makes explicit this thesis of Duguit by resort to formal logic and supplying some missing premises, and says that the extent to which we accept

Duguit's conclusion depends on whether and to what extent we recognise equality, both as a fact and as a postulate for man's treatment in society. Duguit, who calls for cooperation and mutual dependence, also calls for reforms democratically undertaken for breaking through to a new morality; this is first achieved by a few, and is justifiable on the basis of its expected results for society or even mankind as a whole.

At a time when sociological perspectives were neither perceived nor articulated to the same extent they are now, many Western thinkers criticised the Hindu legal system[7] adversely as containing statements regarding what the law ought to be rather than what it was. Sir S. Vardachariar, who was a Judge of Federal Court and an erudite scholar both in Sanskrit and in Hindu Law, has dealt elaborately with this criticism and said that wherever possible, and so far as circumstances permitted, attempts were all along being made in Hindu India to administer justice broadly along the lines indicated in the books.

It is remarkable that in the entire *vyavahara* chapter of Hindu Law there is nothing comparable to the execution chapter of our Civil Procedure Code. This may be due to the fact that *jayapatras* or decrees were considered self-executory, having been rendered by those regarded as just and virtuous. Even *danda* or punishment was supposed to be effective only when inflicted by a virtuous judge. It may even be that in the kind of ordering where the purpose was to enable a person to earn release from the cycle of births and deaths by his *karma* (acts), it was sufficient in a situation where the values or rules of *dharma* conflicted, to resolve that conflict by a source regarded as authoritative; once it was done, there was no need either for a provision to execute that decision, or even to prefer an appeal from it. It is, therefore, understandable that the Hindu judicial system has also been hailed by some discerning observers as unique from the point of view of the coincidence of legal and other social (including religious) values; it has been estimated that such a coincidence may not occur again in the history of human civilization.

The gap between the law in the books and the law in action is a perennial problem of the law. This was the problem which Hindu thinkers had evidently attempted to solve by integrating the legal system with the values of that society—universal values valid for all time and without regard to the time and place (*sanatana*) as well as those valid in the time and place (*kala* and *desa achara*).

Sometimes law has itself been regarded as theory; but theory is never law. It may try to explain law. In another sense, law may refer to a legal, moral, aesthetic or procedural norm. Not all theory is necessarily scientific. Philosophy deals with ideas about world, men, God, etc. There have been different meanings of philosophy—whether it aims at explaining something or everything. But the true view is that it explains everything, the macrocosms and the microcosms; it examines not only what is but what ought to be. It is not limited to the physical world but entitled, and even supposed to mediate in metaphysical questions. Nor is it limited by the rules of pre-established scientific procedure, or by the requirements of exact proof; it is even supposed to engage in speculation beyond the reach of observational tests.

The terms 'philosophy' and 'science' were even used interchangeably once; this is not so in the present century; an endeavour is made to make philosophy more fully scientific.[8] Yet, as Arnold Brecht explains,[9] the validity of ultimate standards that underlie value judgements cannot be established through the scientific method—this is due, in part, to the gulf between what is and what ought to be. Formal logic, though an important tool in the scientific discussion of values, is unable to bridge the gulf. The link between 'is' and 'ought' is seen to be factual not logical. What concerns us here is the impact of the scientific method and of scientific value relativism (an expression used by Brecht) upon the theory of justice.

Whenever a voice within claims to know what is just or unjust, is it God that speaks or nature? If nature, is it the nature of things, or that of the human mind, or human emotions and

passions, or of some other instruments such as man's soul or his conscience? These questions, posed by Brecht, are basic for political and juridical thought. Among proper ends of government, justice has been given high priority at all times. Government's actions ought to be just; government institutions, such as law courts, ought to ensure the preservation of justice. The grounds supplied to support justice—divine law, the law of nature, reason and social contract—have failed to supply all the norms necessary to provide and preserve justice. Laws have to be just and they have to be administered justly. The political scientists have their minds fixed on the former and lawyers on the latter.

During the natural law period, political and legal philosophy were treated as one; during the last hundred years, they have been regarded as separate. Gustav Radbruch, the German legal philosopher whose theories underwent a profound change after World War II, had gone so far as to say, even before World War I, that one may call the theory of political parties the subject proper of the relativistic philosophy of law.[10] Ideas of justice seem to express an urge for an ad-'just'-ment to some ideal state of affairs that is considered a just one or more just. This relation to some ideal state of affairs as a standard is the first relative element one who analyses justice meets. The relative element would be present even if science could tell us which ideal state of affairs would be really just.

Ideas differ as to what is the ideal state which can be regarded as just. The traditional idea of justice accepts the fundamental institutions of daily social life (for e.g., the social institutions of Western civilization) while the trans-traditional idea of justice detaches itself, partly or wholly, from existing institutions, and criticizes them according to principles taken from a traditional scheme of evolution. Kant's hypothetical view was that if there should be anything of absolute value on earth, it could only be the dignity of the individual. To the two nineteenth century values, the welfare of the individual and of the group, Radbruch added a third, the work, the achievement, or more particularly, *Kultur* (spiritual civilization).

There are a variety of conditions or state of affairs which people regard as standard goals in their ideas of justice for the distant future or the present moment. There is a certain segment of equality in every idea of justice—the equalitarian wants not only more but the whole thing. The libertarian would like to measure every thing with the yardstick of liberty. The revelationist, whose highest aim is execution of God's will, may be an individualist or group fanatic according to divine intentions. The conservative or traditionalist, pure and simple, would even like a regressive setting back of the hands of the clock. The conservative is always an authoritarian who regards leadership as a principle of the highest value. To the majority worshipper, to follow the majority would be just and the opposite unjust. The hedonist (like Bentham or J.S. Mill) would oppose the majority worshipper whenever the majority does not act for the highest end. The group worshipper, for whom the group may be the family, fraternity, racial group, religious sect, class, nation, continent or humanity, would subordinate the individual to the group. The classical instance was that of the doctrine of the German National Socialists that all that is useful to the German people is right, all that harms them is wrong. The harmonizer thinks of harmony as an ultimate value. Thomas Jefferson thought a little rebellion now and then is a good thing. The pyramid builder would want a more specific achievement, which may even include among the ultimate the winning of a battle or war. The man of duty would derive rights from duties (functions) not selfish wants, man requiring as much freedom as he needs to fulfil his moral duties—this is the view of the scholastics like Kant, Burke, Stammler and, in a functional sense, Duguit. The peace-and-order fanatic would regard peace and order at the top, regardless of what is preserved. Wherever tolerance is accepted as the basis of society, differing views, each claiming as much respect as any other, will be found side by side.

In addition, a person who discovers what he really thinks may be critical of the trans-traditional ideas of his friends, and may be free to shift from one level to another.

This kind of scientific relativism may have done a great deal to correct, cleanse and refine scholarly thinking about justice, but it has thrown people into bewilderment, into a feeling of helplessness. How then can anyone with any certainty of language ask for more justice beyond deficient existing institutions, or even oppose, with an appeal to justice, any further deterioration? Science can, therefore, throw us back only on human ideas or feelings about justice.

The problem of whether there is a right ultimate yardstick, and what it is, has been removed from science as beyond its reach; it must be left to other methods of selection, such as religious revelation, ethical intuition, philosophical speculation, individual or political choice, or juridical ascertainment of what is valid law. The scientific method does not deny that there may be absolute standards of justice, but only insists that they cannot be scientifically verified; yet, by clarifying meaning and consequences, it can contribute a great deal to rational choice among standards thus clarified. Only jurisprudence can establish the juridical validity of certain basic principles at a definite place and time against dictatorial impositions.

Statements about the justice or injustice of acts, judgements and the like are statements about values—moral values. The nature of man might conceivably include moral tendencies common to all men, though different ideas of justice may prevail at different times and places and even within the same person at different times. Science recognizes that certain elements of moral value judgements are universally present in human nature. It is obvious that there is a certain interconnection between the feeling of justice and certain postulates such as the postulates of truth, of equal treatment under the scheme of values in question, and respect for the necessities of nature in our moral demands on others. Even these may be classified as absolute only in the sense of their being universally human. Political science has demonstrated that some types of political actions give people a better guarantee than do alternative actions for getting what they actually desire and avoiding results that they do not actu-

ally desire. Also, many ideological catchwords, if translated into practical policy, are bound to lead to results, or include the grave risk of leading to results, which those who listen to these slogans with approval actually do not desire, but rather abhor.

Let us take for instance the Lenin—Hayek thesis that it is impossible to implement socialism through democratic means and procedures. According to the latter, socialism will ultimately lead to abolition of democratic liberties, but it is now realized that it is nothing more than a half-truth, which illustrates the difficulty but not impossibility. Brecht concedes that the compatibility between democracy and socialism is still an open one, but suggests that it is not necessary to go all along the totalitarian road, if a majority should be bent on carrying through socialism. If democratic socialism is impossible, then those many people in many countries who ardently want socialism would have no choice except to abandon democracy, and this may well lead to the establishment of a socialistic dictatorship. It is now known beyond dispute that dictatorships do not and cannot solve anything permanently—they seem to make everything worse than before. Nor is it impossible to have co-existence between capitalist and socialist countries. The statement of Khruschev that peaceful co-existence was not part of strategy but a fundamental principle of Soviet foreign policy is probably more accurate than was Stalin's assertion to the contrary.[11] What is now happening in the international scene—opening of channels of communication by breaking icy barriers is a hopeful sign for the future.

It is the factual situation, rather than any philosophical difficulty, that made Edmond N. Cahn concern himself with the sense of injustice. He decided to base man's progress on that which each of us could observe in one's own daily experience, could feel in one's body and know in one's mind: the sense of injustice. The sense of injustice participates in shaping general rules of law and specific judgements. There is no lasting security without the sense of injustice,[12] which feeling has made the active pursuit of justice the *sine qua non* of social support. The

experience of the sense of injustice is itself the greatest of all types of social transformation, because it incites men to join with one another and to participate first in the perception of jeopardy, then in the resistance, and finally in the exultation of an achieved success. These are acts of public solidarity.[13] Yet the sense of injustice can accomplish no good if the country fails to yield to its population what it requires. The first twinge of necessity will make men forget the twinges of injustice; the majority of human beings have always been and are today necessitous.[14] Protracted hunger is an experience which no culture, however eccentric, has yet taught the general mass of its population to enjoy.[15] That they should have even conceived of freedom, despite their being subject to hunger, disease and fear, is itself a great wonder.

Since hungry men cannot be free men, we are vitally concerned, in a developing country like ours, with the rule of law becoming effective and fully operative. This cannot be the case until our democratic way of life permits and renders feasible the removal of what we find around us, abject poverty and the consequent misery of millions. There is no use here for any orthodox concept of socialism itself, except an approach (which cannot be other than pragmatic) to social betterment. If socialism has to function as an ideology, it may have to function more as an ideology of production rather than of mere distribution. In practice, people care less about average level of incomes, if the average level of income rises. Yet we may have to concern ourselves with 'ceilings' to the extent they are relevant to the concept of distributive justice.

Most people are now convinced of what R.H. Tawney called[16] the tyranny of functionless property. Socialism, in this sense, has come to be regarded as the fulfillment of democracy. Democracy is a way of life, but socialism becomes a certain scientific approach to socialist and economic problems. Planning to Jawaharlal Nehru was a thought-out approach to strengthening the base and the pace of progress by eliminating wastage of scarce resources, as only then could the community

advance on all fronts. To accomplish this, he wanted the old Vedantic ideal of life, which is the inner base of everything, to be kept in view.[17] The Vedantic view, which was held earlier in point of time than any of the known religions—Hinduism, Islam, Christianity, etc., is nothing more than the mental life of man reaching a height from which it is possible to survey the field of experience below it.

This ideal is expressed in so many places in the literature of our country, one may not have to do much research to pick out a relevant passage. The following well-known lines from the Gita[18] may furnish a single teaching which shows the basic development that is possible in any sphere of life—spiritual, mental or material. Every individual is responsible for his own development in any field.

> *Uddharet atmanaatmanam naatmanam avasadayet*
> *Atmaiva hiyatmano bandhuratmaivaripuratmanah*
>
> *Let man raise his self by his self, let him not debase his self;*
> *He alone, indeed, is his own friend, he alone his own enemy.*

The advice to Arjuna was to raise himself from the organic level of mere sensory perception. Nothing in the outside world is relevant to this search. This teaching applies to every level of evolution of man; he has to rise from the organic and mental level to the spiritual. This message is not confined to or based on any religious credo; no particular culture or way of life is specially conducive to self-realisation. Nothing of the world is needed to elevate the self; no method is to be adopted, no means to be sought. The self is elevated by the self alone. The significance of this teaching may not even have to be explained at length. There is nothing which could be free from religious overtones and yet concern itself more with than the uniqueness of the individual and his immense responsibility to himself. Did not Sartre say that man is condemned to be free? By making choices, man makes himself, creates or destroys his own moral personality. Many men, however, prefer to flee choice, to escape anxiety and avoid the road to freedom. As a result, as

Kierkegaard said, anxiety has become the dizziness of freedom, the official emotion of our time.

These are, without doubt, moral considerations; they pertain to the quality of the way of life of men and women; if that quality is unequal to the challenge, the hope for democratic survival itself, indeed for man himself, is dim. The Vedantic ideal, which, in the course of several centuries, has soaked into the people, and seems to have an ever present vitality, can be refurbished, despite apparent decadence.

The difficulties posed are not peculiar to a socialist society: they concern every democratic government—capitalist or socialist. The imposition of socialism on a capitalist structure helps lessen the gap between capitalism and socialism. The task of socialism, in its fight for quality, challenges every kind of power which is irresponsible or only semi-responsible. The building of constitutional safeguards of freedom alone can hold in check totalitarian tendencies.[19] The solution consists in making all irresponsible power accountable to the community. Peace will not be achieved as a by-product of socialism, and democratic socialism can stand or fall largely by the intelligence and power with which it seeks freedom. This kind of socialism will not be achieved in one generation or stage; but each stage must bring the blessing to those who live in a certain area; each victory will bring its rewards. It is not a case of one generation, the present, alone having to make all the sacrifices, which may even be outside its capacity. Yet the problems are urgent, and urgency is a very important consideration in fixing priorities. There is no greater or nobler challenge than that we will take our part as citizens, workers, thinkers, neighbours, etc.,—in the process, helping us to better our democratic institutions, other basic forms of human association and the State. The State bureaucracy itself should not be the centre that threatens the freedom and well-being of the citizen. Injustices caused as a by-product of State administration have to be corrected by the State itself, through its diversified institutions and procedures.

Since any legal order is itself a reflection of certain political and social values it would be inexcusable for our legal community to ignore contemporary trends in economic, political and sociological thinking.[20] In contemporary debate, justice is what is called the rule of law. In the face of this hard reality, it may not, practically speaking, be useful to indulge in merely theoretical exercises concerning the distinction between justice according to law and justice in other than a legal sense, and the connection between law in the strict sense and morals in the conventional sense. The conception of morality itself changes. A modern writer[21] talks of moral principles as rational principles relating to ends and means that impinge in any significant way on other persons. A reviewer of this writer's book[22] points out that perhaps the most interesting development in moral philosophy at the present time is the revival of interest in the notion of practical reason. According to another modern thinker,[23] moral judgements are neither expletives nor commands; they are not irrational commitments but genuine judgement, in the sense that they are capable of being true or false, and are subject to rational tests such as consistency and coherence. Man's substantive ends could gather moral significance.

I would regard the questions posed by the welfare state regulating our lives more than before as moral, and demanding our careful and urgent attention; they pertain to the theme of justice in a welfare state.[24] I would commend for your consideration the valid contribution of W. Friedmann, who has concerned himself with major structural changes and problems posed by the growing role of the State and the increasingly intricate interlocking of public and private power.

There are plenty of antinomies within the idea of justice: some ideas of justice enshrine the inequality of men, races, castes, etc., even as some are their opposite. There are those which are based on the sanctity of private property, but others which regard public ownership of the major means of production, and a minimum claim of each to a share of the resource of the nation, as elementary aspects of justice. Friedmann concerns himself

with a mixed economy in a non-totalitarian state, and is therefore of great relevance to us. In a totalitarian state, it is a mere question of efficiency, not a case of balancing private and public power. Alliance between public power and private economic power, he points out, will make the expression 'public interest' an empty phrase; the danger to be avoided, therefore, is the formation of a close alliance between the bureaucratised giant managerial corporation with the governmental structure, to their mutual benefit. It is this very danger which is sought to be avoided by the mixed economy concept. Social justice would become a reality if the law finds a response not only to the concentration of economic power in the hands of the over-mighty subject, but also finds a way to counter and moderate the helplessness of the individual who, in a less and less sufficient economy, becomes increasingly dependent on forces that, if unchecked, can completely control and dominate his life.

Discussing the failure of the right, Arthur M. Schlesinger Jr.,[25] refers to the naked accumulation of money giving rise to a plutocracy, as distinct from aristocracy. Aristocracy at its best has something of a family relationship with the nation; but the businessman rescued society from the warrior and handed it over to the accountant. Plutocracy, on the other hand, is a possessing class founded, not on the complex values which arise in a stable and interdependent society, but on the naked accumulation of money. The government by the plutocracy doomed France; the plutocracy was expelled in time in Britain—the shift from Chamberlain to Churchill showing the advantages of an intelligent aristocracy. When the euphoria of capitalism is gone, business rule sets in, tending to bring public affairs to a state of crisis, and to drive the rest of the community into despair, bordering on revolution. The middle classes allow themselves to be plundered quite easily, provided a little pressure is brought to bear on them, and they are intimidated by the fear of revolution. He points out that history gives us little reason to expect organised political intelligence from the dominant forces in the business community; it not only lacks the skill to govern soci-

ety in its own interest, but it is increasingly lacking the will to do so. The dynamism is trickling out in a world where passion for security breeds mergers and monopolies. By a curious irony, therefore, when it achieves a new economic success and an altogether new economic stability, the capitalist system begins to destroy the psychological interest in its own survival. This process of capitalist suicide is complex, but apparently remorseless. It has, therefore, been depending on non-business groups capable of political leadership.

He also discusses the failure of the left, the appeal of which lies, in part, in the progressive intellectual's sense of guilt over living pleasantly by his skills instead of unpleasantly by his hands, partly in the intellectual's somewhat feminine fascination with the rude and muscular power of the proletariat, partly in the intellectual's desire to compensate for his own sense of alienation by immersing himself in the broad material expanse of the masses. Worship of the proletariat thus becomes a perfect fulfillment for the frustrations of the progressive.

Discussing the challenge of totalitarianism, he says that modern technology has created a free society. To a society which is uncertain, fragmented, paralysed by doubts and fears, totalitarianism exerts the magnetic influence of a lodestone on iron filings; the invalids are able to throw away their crutches at the shrine. Fascism and communism arise from a genuinely revolutionary dissatisfaction with existing society; but these revolutionary impulses die under the very heels of the new ruling class installed in power.

The philosophy of the free play of economic forces is no longer accepted in contemporary democracy; the positive role of the State and the use of law for the attainment of certain economic and social ends is acknowledged.[26]

The State itself does not function as a mindless organization, it is the focus of loyalties, of emotional allegiances, and especially in times of crisis, the embodiment of a sense of unity transcending the balancing of competing interests. The individual looks to the State for protection and implementation of

some basic principles of justice. In a pluralistic economy, one arm of state power may be invoked against another—as it is against public power—or against private power.[27] The assumption by the State of an ever-widening range of social responsibilities is a necessary corollary of the change in the social condition of man.[28] The classical liberal conception of the State, where the public and private spheres of activity were neatly separated, and the government did not participate in the economic life,[29] seems no longer possible. The legal system, in such a context, subsumes that the public and private sectors are within their legitimate spheres, and one does not strangulate the other. One cannot afford, in a big country, to shy away from mere bigness.

All lawmaking and administration are not clearly separable activities. In spite of the growth of administrative law, vast areas where administrative decisions deeply affect the interests of groups and individuals large and significant areas remain entirely without judicial control.[30] Principles and structure of administration hence become very important.[31] How to balance the need for wide policy discretion on the part of the government, with the legal protection of legitimate economic interests of private groups and individuals, is a question of great importance and difficulty.[32] Selective enforcement of the law is yet another serious problem;[33] if worked improperly or arbitrarily, it can itself damage the rule of law vitally.

The various points at which the State administrative power affects the individual or group economic interests are so well-known, that some legal review procedure has to be made available is accepted on all hands. Some of these points of such contact are when (a) the State acts as provider and distributes a variety of social benefits; (b) the need is felt to exercise control over private contractual and property relations; (c) an important proportion of transactions take place between government and private corporations; (d) the regulatory functions of government involve licensing occupational, professional and economic activities, and (e) the State concerns itself with the whole area of restrictive trade practices and the whole field of labour relations.[34]

The problems attendant upon distributive justice as distinct from corrective justice are becoming increasingly difficult. At every turn, one meets with the problem of equality and legitimacy of policy considerations.[35]

The term 'rule of law' has itself no static of absolute meaning. It cannot be understood today except in relation to the functions of a welfare state; the maintenance and protection of a balance between public and private power may require room for considerable variations. A greater measure of direct governmental enterprise may be necessary where the general standard is low and has to be improved; but more State ownership and public enterprise does not promise to be a panacea either. This cannot also be evaluated in purely economic terms. For instance, where the public interest lies in cheap and efficient transport, profit is not the primary goal. A fuller development of administrative justice, designed to prevent State power from becoming uncontrolled, seems necessary to give a sense of security and equality.[36] Half-baked compromises between *laissez-faire* and public responsibility will neither help public nor private interest.[37]

The above insights highlight clearly the need for clarity in the matter of what has to be accomplished. The approaches and legal controls to be devised are quite distinct and separate if one wishes to follow the totalitarian path, but what is articulated here are the considerations which become relevant if one wishes to avoid the totalitarian road and pursue the democratic way of life. The legal system, it is submitted, is related to the values enshrined in its Constitution and its laws; considerations inconsistent with the values assumed by that legal system cannot be pursued unless the legal system itself is sought to be changed, not piecemeal, but wholly. Since the chief merit of the democratic way of life consists in values and the necessities (felt or otherwise) of life being articulated freely and a consensus achieved concerning them, any attitude or approach which would be singularly appropriate only in a totalitarian context has to be carefully excluded. Any confusion introduced into

this discussion, either deliberately or unintentionally, will completely distort understanding, and may be a disservice done to the democratic way of life. It was Arthur M. Schlesinger Jr.,[38] who made the perspicuous remark that the twentieth century, which began as a century of democracy, has become the century of the totalitarian revolt against democracy; totalitarian indoctrination could destroy the boundaries of individual personality, which is the hallmark of the democratic way of life.

Reference was made, to start with, to Hindu jurisprudence because that legal system was built to subserve the values as they were then conceived by the then Hindu society. The expression *dharma* was used in a sense in which it was much wider than the meaning that came to be attached to the expression 'law' in the nineteenth century, since by then law, which had grown from out of its entanglements with religion or magic, and later on theology, was set off as a separate discipline. It was extreme positivism that led to Hitlerite Germany and paved the way for World War II. In the thirties, a German lawyer would have considered one who talked of law without the element of command by a lawful superior as soft-minded. Western scholars highly critical of the concept of Hindu *dharma* considered the concept imprecise, when translated as law. It was this kind of difficulty that was faced during the Nuremberg trials, when it became necessary to hold that the defence of obedience of orders issued by a lawful superior was not admissible in the case of those war crimes which were perpetrated against humanity. Space and time forbid me from going into this aspect here; I have discussed this elsewhere. The fascinating amount of material on this subject cannot even be adequately listed.[39]

After having this set of jurisprudence as a separate discipline, attempts were made to use jurisprudence with other disciplines like sociology, economics, politics, etc. Despite the comparatively recent efforts of American realists, law seems to have received insufficient attention in American sociology.[40] The neglect by lawyers generally, and particularly in this subcontinent, of sociology is too well-known to require specific men-

tion. But it is now realised that law in any field to be adequate and sound must rest on facts. It must grow out of experience. Thus, research designed to make systematic investigations into human experience becomes indispensable to the healthy growth of law.[41] The Hindu experiment unmistakably shows the possibility of preservation of the individual on the basis of complete value integration, and the reduction of gaps between law in the books and law in action. But no social problem can be finally solved. Even the most favourable social arrangements cannot guarantee individual virtue. It is worth recalling that there was such an identity between principles and action. This was so because the *dharma* hypothesis restricted state action in one respect, namely, that it could not make law itself, but extended in another respect, for it had to supervise the whole life of its subject, not its material or secular side only. The Hindu purpose being one to earn release from the cycle of births and deaths, this was to be achieved by avoiding *papa* (sin) and doing *punya* (good); the social order was itself worked out in a manner which would effectively serve that purpose. The lesson that has to be learnt from this experiment is that whatever is the goal set for itself by society, the legal order has to concern itself with every thing that is necessary to achieve this goal, including within its scope what has to be pursued or avoided.

When one talks of law's concern with justice, it is, in the ultimate analysis, the determination of what is just by those composing that society. It is here that it is important to know that there are certain values which humanity finds universal and true for all time, but many others which are valid only in the time and place. No legal system would be realistic if it did not pay adequate regard to both these kinds of values. All these require planning. Such planning has to be done very carefully and with utmost sincerity and conviction. We owe to Arthur Schlesinger Jr., the caution that the danger of the total planner is, first, that his blunders may convulse the entire economy, and second, that in a panic-stricken effort to cover up his blunders, he may multiply his own controls till they destroy the initia-

tives and the free movement of men. The social system should represent organised fulfillment, instead of organised frustration. Democracy can survive only if it develops a living emotional content, and freedom itself generates a fighting faith. We must realise that the weakness of democracy is its nature to dissipate rather than concentrate its internal moral force; it should take measures to counteract dissipation. Its strength, on the other hand, consists in its startling insight into the value of the individual. Democracy, therefore, cannot afford to tolerate moral indolence.

The strength of the English law is seen to consist in its relationship with the moral law. Lord Devlin[42] thought that no sensible person would deny the existence of such a connection. Prof. Goodhart[43] has explained how morality has played a particularly important part in the development of common law, and how the English law and moral law are rarely in conflict. His conclusion was that the essence of law does not lie either in the fact that it has been commanded by some one in authority, or that it contains a sanction in case the rule is violated; he believed it to be a rule of human conduct, which is recognized as being obligatory; it is the sense of obligation that gives the rule its character. The relationship between law and morals is thus of the utmost importance.

The problem, however, in analysing moral responsibility today is to fashion a conception similar to the legal model to be called responsibility, but sufficiently rational and autonomous to be called moral.[44] Law is one thing, morals another; in relation to law is not one but several other things. The moral claims of settled law in a constitutional democracy cannot also be overlooked.[45]

Judges, courts and lawyers might make law a more effective instrument of government if they pay attention to the language of morality and critical consideration of the human and variable purposes which society seeks to achieve through law. In asking for a separation of morals, Holmes was only asking for the repudiation of the implications of the absolute, which im-

posed the inherited morality of their generation. The blood of law would, according to Holmes, become thicker if men concerned themselves with discovering the human ends which they are seeking to achieve through law.[46] This discovery postulates what Leon Fuller[47] calls the injunction to open up, maintain and preserve the integrity of the channels of communication by which men convey to one another what they perceive, feel and desire. He also pointed out[48] that it is only an ethics founded on the natural law theory that stands any chance to profit from advances in scientific knowledge of human nature. It is, furthermore, an ethics that not only puts but demands freedom in the search of a true understanding of man.

In this sense, it stands at the opposite pole from any theory that attempts to lay down in advance an eternal, unchanging code of law. Douglas Sturn[49] explains that Fuller's natural law theory postulates that each man is by virtue of the fact that he is a man, a living, purposing, communicating being and ought to be treated as such, as far as possible, without regard to differentiating characteristics, and if human life is preserved, purposiveness is kept alive and communication is maintained. Fuller himself put it succinctly:[50] that is good which advances man's nature, that is bad which keeps him from realising it. Fuller had throughout held the impossibility, either theoretical or practical, of separating law from morals. Meeting the various criticisms concerning Fuller's theory of natural law, Douglas Sturn points out that Fuller was not irrevocably committed to the term 'natural law' and that statutory and decisional law is not, and ought not, to be considered an autonomous, unrelated, isolated dimension of human institutions and actions. Rather, law is an aspect only loosely and ambiguously differentiated from other aspects of normative rules. In this sense, law itself is an expression of, and intimately, though not simply, related to, morality. Normative judgements, legal and moral, are not merely rooted in subjective emotions and derived from the imaginative propositions of men; rather, they are properly related to, and find a standard of their adequacy, in objective facts of pur-

posive character. Law, as the enterprise of subjecting human conduct to the governance of rules, is one institutional means whereby an association attempts, and may be able to fulfil, its common need and purpose. Though the adequacy of law has to be measured against such common needs and purposes, which may be ever changing and contain conflicting elements and objective data, at the same time law generates its own norms which must be adhered to if the law is to fulfil its social function. Law, therefore, is an aspect of social reality; social reality is an expression of humanity. It is further explained by Douglas Sturn that Leon Fuller acknowledged this interconnection, not always constant in detail. This is what is of relevance to our enquiry.

There is no space here for the details of the Hart—Fuller controversy regarding the connection between law and morals.[51] There are some who still think that the law should concern itself only with order and regulation—they are naturally indifferent to its moral content. For those who value the connection between law and morality, it is a profitable exercise to overhaul from time to time a branch of law to identify it and restate the moral principles behind it, and see how effective it is in promoting and applying them.

We all know that equity came as the first response in England to justice, as it was being administered, failing to give effect to moral obligations that were generally recognised.[52] The same might be said about the Roman Aequitas. But when the same principles become legalised it may lead in individual cases to inequity or injustice; morality is at its best when a case is judged individually on its merits, provided the judge is a good judge. Lord Devlin explains how[53] the law could be the servant or friend of morality by translating it into rules which may be proof against prejudice. He warns us, however, that danger may lurk even in a general requirement of good faith, instancing the Nazi requirement that no one could deal in good faith with a Jew.

There is difficulty, conceptually, about fusion of the 'ought' and the 'is', because of the great gulf there is between them; we

find even J.S. Mill, despite his warning us about confusing the two, still saying that happiness ought to be desired because it is desired. The Stammler thesis that there is a natural law with a variable content seems to suggest that there is a natural law above the positive law,[54] but he appears to have been only searching for invariable criteria of objectively justified purposes and endeavours; in short, to proceed to standards of objectively right law. He continued to hold in his later writings that there were scientifically demonstrable, absolute standards of justice.[55] But none of these standards can be upheld by science alone, without recourse to ideals based on religious, scientifically unverifiable sources, or to historical conditions, or to not universal personal opinions and preferences, though, at least indirectly, the search for absolutes has enriched the social sciences.[56]

Even though justice may depend very greatly on factors that have no universal character, still, all ideas of justice, and all varieties of thinking and feeling about justice have something in common. No one in public life can neglect the human longing for justice. Dictators have often falsified the facts when they appealed to the sense of justice; the very fact that they took so much trouble to persuade people of the justice of their policies testifies to the tremendous importance of the sense of justice.[57] Anthropologists have pointed out that at the back of apparent differences, identical ethical notions could often be found to operate in both primitive and advanced societies.[58] There has been a lack of systematic co-ordination between anthropology, philosophy and political science; political scientists have failed to formulate concrete questions relevant to our problems that can be put to a test through anthropological research.[59] Brecht formulates a tentative list of universal postulates of justice: (1) accordance with objective truth (in the objective sense) requires relevant statements about facts and relationships to be objectively true—what Anthony Sampson[60] calls the authority of facts—and, subjectively, what the acting or judging person honestly believes is true; (2) generality of system of values which is applied, not arbitrary selection of different systems of values,

in considering one case with another; (3) treating as equal what is equal under the accepted system, and not discriminating arbitrarily—the expression arbitrary itself conveying the idea of being contrary to the accepted system; (4) no restriction of freedom beyond the requirements of the accepted system, and (5) respect for the necessities of nature in the strictest sense—not to inflict punishment or moral reproach for non-fulfillment of a law or command which is impossible of fulfillment.[61]

These insights appear extremely valuable when we consider the inner strength of the law, which has to depend chiefly upon the habit of obedience which it can foster in the people. The strength of the law does not obviously lie merely in the cases, where laws are broken and enforced, but where the law is implicitly followed, not because of legal sanction, but on account of the moral obligation to obey, which is the true basis of the habit of obedience. It is necessary, therefore, to investigate all possible causes and situations that may lead to the breaking of laws openly or even secretly. The secret violations are the usual problems of legal order; not so usual, at least until recently, are the open acts of disobedience.

Before going into this extremely important aspect, it is necessary to spend a little time on how the gulf between the law in action and the law in the books increases. In the context in which we are discussing the connection between law and morals, it is now realised that there is nothing which widens the gap further than the rule of law losing all meaning to the indigent who cannot enforce the law on account of the cost of the enforcement and their own indigence. Any legal system which puts a premium on costly legal professional services and legal expenses, a situation worsened by the law's delays, makes it difficult for the system being genuinely accepted. Where there is discrimination and arbitrariness in enforcement, which often has to be selective, the acceptance of the system becomes more difficult.

Savigny, who talked of the *volksgeist* and opposed codification, was still conscious that with maturity, both life and law

become more specialised and artificial, and that the people would not remain instinctively familiar (despite the presumption that everyone knows the law) with all the details of the law. He seemed to be opposing legislation and codification not only for the Germany of his time, but for all time. This approach is hardly realistic today. Ehrlich, who followed Savigny, was responsible for the merger of juristic and sociological thought in Germany, a trend which Roscoe Pound[62] extended to the common law countries. The lawyers' attention was thus turned to the problems of adjustment and maladjustment of law. The possible and desirable range of social control through law, as against no controls at all, is one which each generation must struggle with in terms of its own experience and circumstances.[63] It is well-known that even when the purposes are clear, there is considerable gap between legislation and the aspirations of the people. Oftentimes it happens that the legislative purposes are themselves not clear—not to speak of the much maligned draftsman's deficiencies. Legislation in such a context—especially when it comes as an inescapable response to pressures without the kind of survey that has to precede it in order to make it realistic and effective—can be vacuous; this increases perplexity, when such vacuousness is passed on to the administrator and ultimately to the judge. In such a situation, it should be easy to make scapegoats of those involved finally with these deficiencies.

In order to have a total perspective of this problem, it is necessary to notice the modern thinking concerning the concept of separation of functions. It is now known that separation of functions might have led to greater safety but not to efficiency. There has been a greater commingling of functions than when Montesquieu first wrote about them. The separation doctrine has been used both to support as well as to refute the need for judicial invalidation. Scholars today meet the argument about the substitution of the will of the legislature by that of the court on the ground that in many matters of constitutional repugnancy, will and judgement cannot be tidily separated, even apart from the concept of separation itself withering. Geoffrey

Marshall[64] sums up the deficiencies of the notion of separation of powers in the following manner: (1) it is rarely clear whether, and in what sense, there is such a separation. The argument that legislative, executive and judicial powers are constitutionally vested in particular persons or bodies is inconclusive. (2) It is unclear what it is that is separated, since the notions of legislation, adjudication and execution have not proved capable of precise definition. (3) It has been used to cover ideas of physical separation of persons, legal incompatibilities between roles or officers, differentiation of functions, isolation or immunity of agencies, and mutual checking, supervisions or policing of one branch by another. (4) In considering the mixing of governmental functions, different treatment has been given to the division between legislative and executive functions from that accorded to the division between the judicial and the other two functions. The doctrine provides no guidance as to whether this differing treatment is appropriate or necessary, or whether voluntary transfers or partial delegations of functions between branches of government are legitimate. In short, the principle is infected with so much impression and inconsistency, that it may be counted as little more than a jumbled portmanteau of arguments for policies which ought to be supported or rejected on other grounds. It is not possible to go into these aspects here.

It would be necessary in this context to advert, at least very briefly, to the judicial role. Geoffrey Marshall thinks[65] that the real complaint here is that both the judge and law are at fault. If the law does not reflect a single set of values, and if one part of the law can be conceived of as challenging the principles embodied in other parts of the law, then the judges could meaningfully be at least accused of preferring the old to the new. Marshall quotes W. Ivor Jennings[66] in support of this accusation that the English judges were unconsciously led by social conditions (of the thirties) to exhibit a bias against social reforms. This should not bind one to the role of the judiciary itself. As Cordozo pointed out, it is only when the colours do not match and the indexes fail, that the real function of the

Judge begins. This is a role which has to be understood with a proper awareness of its necessity and its inherent difficulty. The role postulates the individual excellence of the judge—in fact the very judicial system is based on that premise. In the Indian scene, as it should be elsewhere also, the quality of his work would largely depend on the quality of the Bar. Since both judges and the members of the Bar ought to be products of a sufficiently sensitive education, one has to pay sufficient attention to the quality of legal education itself, and the continuing education of both judge and lawyer. There is a large body of literature by Indian as well as foreign scholars on this subject. I have also concerned myself with this problem elsewhere.

It has also to be acknowledged that the quality of judicial work itself improves with criticism—the highest that scholarly tradition is capable of. But it has to be noticed, at the same time, that such criticism from persons who do not either believe in the legal system which subserves democracy, or which emanates as part of an expression of unrest that seems to wonder vaguely whether law and order pay, can do incalculable harm. When the ignorant are thought to doubt, they do not know what they may safely believe; in this situation, education in the obvious is more necessary than investigation of the obscure. Some of these aspects have been very ably dealt with by Paul A. Freund.[67]

The judge has to be creative because the legal order in democracy is concerned with change as well as continuity. The accommodation between stability and change is representative of the ultimate task of the law—the resolution of ambiguities and antinomies in human aspiration, personal security and moral responsibility; knowledge and privacy, triumph and fraternity.[68] It is dangerous that judges should be philosophers—almost as dangerous if they are not. It is dangerous too if judges fail to include in their philosophy the special question of the role of judges in relation to other organs of government.[69] Space again forbids our going into this very important aspect of the creative role of judges. To be creative, as judges have to be, is in some

sense to remain within the discipline, involving a tension between vitality and technique, between passion and decorum. No Nobel Prize is awarded to the most revolutionary judge of the year.[70] Nor is there, as Cordozo pointed out, danger of too many creative opinions. I have discussed this aspect also to some extent else where,[71] in the context of the role of judges helping to build a sound public law system, and how an ombudsman cannot be effective without such support.

Aristotle brought out the idea that a happy and successful judge is a good judge—a good judge being one who performs his profession well and virtuously and is seen by the community to perform it so. Thomas M. Franck, another thinker to whose work[72] I would next like to call your kind attention, quotes him[73] and says the state of that character is impartiality. This quality must be demonstrable. The climate of confidence the parties feel in the subjectivity of those who give the verdict must be consciously created.[74] There should develop a mature identification, a growing social unity between the judge and the parties; without it, existential third party law, what he calls judge-made law, will be harmful to social prestige and the viability of the process. With the House of Lords also giving up its old practice of not overruling previous decisions, the title of judge-made law to acceptance by society has in fact been rendered stronger. Referring to the change in the United States from *Plessy and Ferguson*[75] to *Brown v. Board of Education of Topeka,*[76] from separate but equal to perfect equality which could not accommodate separation—Franck asks what had changed in the meantime? The Constitution had not changed, the issues had not changed; the times, the status of the Negro and the knowledge available to man had changed.[77] The judge's conclusion is relevant only within the system of legal hypothesis of the society in which he operates. His fairness is really his ability to see a mid-point of a line that has no existence except as an assumption perceived by designated members of the community on its behalf.[78] Moreover, he must be able to sense when the hypothesis has shifted, and if the shift is clear and non-aberrational, he

should be able and willing to find a mid-point of a new line or work with a new set of figures.[79] These observations were no doubt made by Franck with reference to international judges, who would not be able to solicit an act of faith in favour of a process so epistemologically subjective and temporal. These considerations, with some variation probably, apply to the judges in the Indian scene, whose difficult work has to be backed by not merely their own constant efforts to meet the present day challenges, but also the feeling that there is confidence, of not only the parties but of the members of society by and large, in their subjectivity, which is not that of the disputants, who naturally wish to win, but must have willingness to lose.[80] On the other hand, if disputants take their predictive preferences to be the truth, then third-party decision making, however excellent its process, becomes little more than irrelevant meddling.[81] To elevate the patterns of national prejudice against law to law, he states, is to avoid rape by consenting to be ravished.[82] The extent to which disputes are settled by the adjudicative process, with a faith in that process, may be the ultimate measure of the success of the rule of law in a democracy.

What remains to be considered is the importance of the above discussion in the background of civil disobedience having been the main plank in our country's struggle for independence. Political theorists all over the globe seem to be, of late, fighting shy of answering the question: why and to what extent ought men to obey their rulers and the law? Geoffrey Marshall[83] attempts to answer it. Perhaps no single criterion can be supplied as providing a good reason for obeying any conceivable kind of law. Out of a plurality of reasons, if that be the case, the most important among them may be a matter for debate; some criteria may have validity in certain circumstances only, the question in general, as to why one obeys laws, is different from, and should not be confused with, obedience to a law. The expression 'authority' has itself reference to legitimacy of origin. But the following questions arise further: when lost subsequently, how and when is it lost? Does acceptance of authority commit

one to unlimited obedience? Under what circumstances can it be legitimately withheld? A related question would be the scale of disobedience; passive and non-violent resistance to enforcement; obstruction or organised disobedience to other related legislative or administrative measures; sabotage and revolutionary attempts to supplant existing governmental authority. Two significant moral questions arise in this context: (1) where do protest and non-acquiescence merge into non-compliance and illegality? (2) where is illegality accompanied by violence? These are extremely difficult questions; sufficient thought has yet not been bestowed on them by political scientists or legal theorists. The difficulty in conceding a right to disobey invalid laws, or obeying only laws concluded to be valid is obvious. People taking part in a democratic process cannot pick and choose the laws they wish to obey. Unlimited legislative power can also be morally intolerable. Geoffrey Marshall refers to what he calls a textbook commonplace presumption (which is theoretically capable of breaking down) that what makes this unlimited power tolerable is the permanent possibility of an extra-legal check to the legal sovereign. Nobody, then, could be said to have consented to exclude the possibility of disobedience. In extreme cases, namely, when the postulates of a rule of law in a democratic society, like freedom, equality, etc., are violated, it may be difficult to enforce obedience; this may also depend upon the degree of inequality. Less extreme cases present even more difficulty.

Mr. Justice Black, who dissented in *Cox v. Louisiana* (98) said that experience shows that it is not a far step from the earnest, honest, patriotic, kind-spirited multitude of today to the fanatical, threatening, lawless mob of tomorrow. And the crowd that press in the streets for noble causes today can be supplanted tomorrow by street mobs pressuring courts for precisely opposite ends. The question thus posed is whether there is a social or moral right to disobey a plainly valid law.

Morality is related, therefore, not merely to the just application of law, but to the content of the law itself. It may be

necessary to obey an unjust law, because disobedience to it would imperil just laws.[84]

Moral considerations cannot be avoided by mere resort to the juristic theory that a law cannot become invalid by transgression of accepted moral norms. In the light of these practical considerations, it may be more prudent to strengthen the legal system by incorporating into it the values which are accepted by the society which the legal system serves, and avoid those that may be spurned by it. Roscoe Pound gave us this insight when he said that law does not have to conform to a higher law; it must gain in inner strength.

I have thus far endeavoured to present the views of a few out of the many serious thinkers on this subject, practically in their own language, to avoid as much distortion as possible; chief of them are the wise and mature Arnold Brecht (whose work is full of significance to the legal theorist), Julius Stone, W. Friedmann, Edmond N. Cahn, Arthur M. Schlesinger, Jr., and Geoffrey Marshall, who seem to be particularly relevant to our theme. I have endeavoured to state the position, as I understand it, from the works of scholars of eminence, those referred to by me, in the hope that the dissemination of such thinking among the members of the legal community may itself induce them to take part in the dialogue on this important theme.

The legal community must also realise that the rule of law is too important to be the sole concern of judges and lawyers; the citizen is vitally affected by it. It was, however, seen that any criticism of the legal system must be relevant to that system. The founding fathers of our Constitution had concerned themselves with the balancing of social justice and fundamental rights. Amelioration of the conditions of sections of the people who have remained weak, owing to historical and other causes is what social justice seeks to achieve. Julius Stone observes[85] that India's will to meet this challenge merits not only administration but the most generous aid which the more developed nations can afford, for very great issues for mankind depend on her example. The question whether India can escape the Hobson's choice be-

tween pragmatic planning languishing on the blue print, and resorting to dictatorship to implement the plans is only one of those issues. It is very important for us, therefore, that we are at least clear in our minds as to the nature of the challenge and of the legal system. Having chosen the democratic path, we may not be able to attempt a solution of our problems by approaches which may be inconsistent with it. This is for us, our moral situation, as well.

Granted the necessary insights and the will, there seems to be room for hope that we can meet the challenge.

It would be appropriate to conclude this paper by citing one of the world's leading anthropologists, who, while reviewing *Asian Drama*,[86] did not share the same pessimism about India, which is the land of Ramanuja. The allusion is to the great Vaishnavite saint of South India who, under an oath of secrecy not to divulge the secret initiation given to him by his guru into the *Ashtakara Mantra*, revealed it from the top of the temple walls to those assembled to hear him. When threatened by his guru with a curse of becoming irredeemable, by reason of his having violated the oath of secrecy, Ramanuja expressed his great happiness that while he alone would be damned by that curse, all those who had heard the *mantra* from him would be redeemed.

Notes

1. *Dharma Sastras.*
2. Harold A. Gould, *The Theory of Social Stratification and the Case of Indian Society*, pp.145–7.
3. Ludwig Von Mises, *Theory and History*, P.III.
4. Leon Duguit: *L'Etal, le Droit Objectif et Loi Positive* (1901) translated into English: *Theory of Objective Law Anterior to the State*, Modern Legal Philosophers series, Vol.7 (1968).
5. Arnold Brecht, *Political Theory* (1970).
6. Ibid., pp.126, 128–30, 304, 562.
7. Lucknow University, Radha Kamal Mukerjee Endowment Lectures (1945) on the Hindu Judicial System, Pub. 1946.

8. Arnold Brecht, *Political Theory*, pp.14–17.
9. Ibid., pp.117–136.
10. *Grundzlige der Rechtsphilosophie.*
11. This is a bare, but by no means complete or even faithful, summary of Arnold Brecht's *Political Theory.*
12. Edmond N. Cahn, *Sense of Injustice*, p.175, 177, 185.
13. Ibid., p.186.
14. Ibid., pp.178–9.
15. Ibid., p.183. According to a study made by the Indian Chambers of Commerce and Industry, out of a total population of 529.5 million, 218.3 million (over 40%) were below the poverty line at the end of 1969. *The Times of India* dated 12.10.1972.
16. *The Executive Society.*
17. 'Democracy, Communism, Socialism and Capitalism', *The New Leader*, September 8, 1958.
18. Chapter VI, verse 5.
19. R.H.S. Crossman, *Socialism of the New Despotism*, 1956.
20. W. Friedmann, *The State and Rule of law in a Mixed Economy*, 1971, based on the Tagore law Lectures delivered by him in 1970.
21. F.C. Charles, *An Anatomy of Values: Problems of Personal and Social Choice* (1970) p.41.
22. See 84 *Harvard Law Review*, 1045.
23. Morris Ginsberg, *On Justice in Society* (1965).
24. Harry Street, *Justice in the Welfare State*. The Hamlyn Lecture, 1968.
25. The Vital Centre, *The Politics of Freedom*, 1950.
26. Friedmann, op. cit., 26, p.23.
27. ibid. pp. 9–10.
28. ibid. p.30.
29. ibid. p.71.
30. ibid. p.75.
31. ibid. p.74.
32. ibid. p.81.
33. See Kenneth Culp Davis, *Discretionary Justice*, 1969.
34. op cit. 39.
35. ibid. pp.85–95.

36. ibid. pp.94–98.
37. ibid. p.101.
38. *Jaipur Law Journal*, p.143.
39. Dr. H.O. Pappex, 'On the validity of judicial decisions in the Nazi Era,' (1960) Vol. 23, *Modern Law Review*, p.260.
40. Arnold Pose, *Problems in Sociology and Law Enforcement.*
41. Dean Erwin N. Grisvold, quoted by F. James David in 'The Sociological Study of Law', *Society and the Law*, p.3.
42. *The Enforcement of Law and Morals.*
43. *English Law and Moral Law.* The Hamlyn Lectures, 1955.
44. Joel Feinberg, *Doing and Deserving*, p.37.
45. Book review by Henry Hart Jr. of Holmes' *Positivism: Addendum*: 64 *Harvard Law Review*, p.936.
46. Rejoinder by Mark De Welfe Howe whose book was reviewed by Henry Hart Jr., 60 *Harvard Law Review*, 939.
47. *The Morality of Law* (1964) p.186.
48. 'American Legal Philosophy at Mid Century', 6 *Journal of Legal Education*, 451.
49. 'Leon Fuller's Multi-dimensional Natural Law Theory', 18 (1966) *Stanford Law Review* p.622, 618.
50. Op.cit., 46, 472.
51. Prof. H.L.A. Hart, 'Positivism and Separation of Law and Morals', Vol.71, *Harvard Law Review* 593; Prof. Leon Fuller, 'Positivism and Fidelity to Law', same Vol. p.630. Hart, *The Concept of Law* (1961); Fuller, *The Morality of Law* (1964).
52. Devlin, *Enforcement of Morals*, p.45.
53. ibid, p.46.
54. A. Brecht, *Political Theory*, p.205.
55. ibid, p.206.
56. ibid, pp. 362–363.
57. ibid, p.389.
58. ibid, p.392.
59. ibid, p.393.
60. *The Anatomy of Britain.*
61. Brecht, *Political Theory*, p.396.

62. 'Courts and Purpose of Sociological Jurisprudence', (1911) 24 *Harvard Law Review* 591.
63. Julius Stone, *Social Dimensions of Law and Justice.*
64. *Constitutional Theory* (1971). For a review of this book by R.F.V. Houston, see 35 (1972), *Modern Law Review*, pp. 198–200.
65. ibid, p.85.
66. 'Courts and Administrative Law', 47 *Harvard Law Review.* 426, 452.
67. *On Law and Justice*, 1668.
68. Freund, *Law and Justice*, p.82, 107.
69. ibid, p.165.
70. ibid, p.72.
71. S. Rangarajan, 'Judicial Creativity and the Ombudsman'. Paper read at a seminar organised by the Provincial Bar (Madras) Federation in 1963. (The papers have been edited by Sri T.V. Viswanatha Iyer and published.)
72. *The Structure of Impartiality* (1968).
73. ibid, p.82.
74. ibid, p.83.
75. 163 U.S. 537.
76. 347 U.S. 483, 1954.
77. Op.cit. pp. 58–59.
78. ibid, p.86.
79. ibid, pp.86–87.
80. ibid, p.307.
81. ibid, p.308.
82. ibid, p.182.
83. *Constitutional Theory*, pp.194–224.
84. Morris Ginsberg, *On Justice in Society* (1963).
85. *Social Dimension of Law and Justice*, p.768.
86. By Gunnar Myrdal.

7

The Idea of Human Values

'VALUES', AN EXPRESSION indulged in by present day sociologists to perhaps a greater extent, more than any other, have been the concern of the Indian thinker from times immemorial. The *purusharthas* are basic human values. *Dharma*, for which we do not have any corresponding expression in another language, is thus a value system. *Sanatanadharma* would, in modern parlance, mean eternal value—in other words, value regardless of the time and place, as distinguished from any other which may have value only in the time and place.

Whether modern insights have corroded the possibility of there being any such permanent value or not, our time-old concern with values—or, even more, a value system—seems clear.

Another expression, which is probably equally, if not more, in use by present day sociologists is 'modernisation'. This is obviously used in the context of societies, formerly regarded as closed ones, becoming more open. But it might be a mistake to understand this concept as 'Westernisation' as one may suspect is happening to some extent: sociologists of American vintage would like to impose or spread a new colonialism as it were. Nothing pleases an American sociologist coming to India for the first time better than listening to others from the same (American) stable, speaking the same jargon; this is a flattering function to his soul that, wherever he goes on this globe, he listens to the same language. All this seems grossly superficial;

without, however, indulging in the same mistake—of being parochial—let us not even speak of this in Indian terms. The underlying purpose so far was only to highlight the fact that there is no novelty to an Indian intellectual to be 'exposed' (as the expression would have it) to the concept of 'value'.

All of us are doubtless familiar with the values, whether they were serving both the requirements of the life herein and the life hereafter—everything being viewed against the postulate of the cycle of births and deaths. The whole value system was integrated to not only suit but effectuate this purpose: a conflict in the principles of *dharma* had only to be dispassionately reserved by a non-combatant (the very structure of impartiality) umpire; it became then almost self-enforcing. There was no chapter pertaining to execution of decisions in the whole of the *Vyavahara* chapter of the *Dharma Sastra*, corresponding to Chapter XXI of our Civil Procedure Code. By this very process, the gap between law in the book and law in action was avoided: this would not convey the idea that Hindu jurisprudence itself was only a hair-brained academic exercise, without any practical application or roots. The prevailing curse today of any legal system cast in the western mould is the ever-widening gap between law in the book and law in action, and of any modern society the unbridgeable gulf between values to which lip service is being bitterly paid but not meant. Legal norms are found to be clearly inadequate to bring about the bridging of this gulf; the remedy for this is said to lie in non-legal criteria being adopted (when required to support necessary values) to support legal norms and thus help enforceability. In the larger modern social context, there seems no hope even of being able to bridge the said gulf, at a time when every social institution, family, education, religion, etc., is cracking.

The above, and considerations of a like nature, take one immediately to the wider field of the alienation, and, consequently, frustration and suffering, that result from individuals not being able to internalise societal values meant to be secured by structures external to man. From the Marxian angle, this is

the starting point of alienation; Western philosophy or thought has not yet been able to even conceptualize any solution to this vexing problem of man's unhappiness and suffering resulting from such alienation. The growing insights into the problem of alienation have only enabled us to see more and more clearly that alienation that results from poverty is probably far less terrifying than what results from affluence. (See the insightful work of Erich Fromm). The new humanism calls for elimination, or at least lessening to the extent possible, of such sense of alienation. But how?

In the ultimate analysis, the great threat to human values no doubt seems to stem from man's deep sense of frustration due to alienation; if it is due to poverty, there is at least hope with the ceasing of poverty (as there is at the moment in India) of getting over this taut human situation. But poverty does not seem, unfortunately, to be the only cause of such alienation; affluence seems to only make it worse, where the society is fed on an exclusive diet of wanting more and more, regardless of what the mere possessing of things (some of them useful upto a point) may be able to give. This is how an ascription oriented society is described. But one thing seems certain: mankind only becomes worse off for being induced to want so many things, while it seems possible or easier (or even happier?) to do without. The future of man's happiness then may lie somewhere in the direction of exploration of optimality, if one can at all be found, in this respect.

But quite apart from these considerations, the lesson of the *Vedanta* seems clearly different: it is to highlight consciousness—a consciousness which will enable man to react to the structures external to him in the manner least adverse, even most beneficial, to him. This reaction being obviously subjective permits an equable reaction (*samadukkah*). Even more important is man's potential for uniting himself with a power that can bring unalloyed bliss (*Ananda*). If this is possible, then that would be the surest way to happiness—eternal bliss, which capacity can even convert suffering into *Ananda*, a kind of divine materialism. It

is then a case of unity (happiness) amidst diversities (unhappiness); to achieve this, man has to be capable of transforming himself. This very process of transformation sets one on the path towards happiness; it is only resistance to further transformation, once the process of transformation starts, that can cause unhappiness.

Is this mere chimera or hallucination? If feeling (*bhava*) is based on, or dependent upon consciousness, then in the language of Patanjali, man need have nothing else. This is not mere escape, as some mind-swapping techniques masquerading as Indian *Yoga* would lead to. The cultivation of the needed consciousness would involve coming to intimate grips with practical teaching of the *sadhana* of Internal Yoga by Sri Aurobindo and the Mother. The Yoga is not magic or black art; it does not consist of a few spectacular things done sporadically in a lifetime; it is a constant glow of happiness that requires the integration of all those human faculties to subserve the achievement of a steady and blissful state of beatitude and love; of work performed with the greatest tenderness and skill—skills acquired through the labour of love to serve fellow men. It is probably this kind of human situation which the great poet Bhartrihari described in the *nitisataka*—a society which enables the evolution of *satpurushas*, good people, who bring about the happiness of other people by sacrificing their own interest. But are there not, in the poet's words *manavraksasas*, veritable human demons who destroy other people's welfare to ensure their own self-interest? The poet has really no words to describe those who would destroy other people's welfare even without any gain to themselves or to others!

What will enable us to have more *satpurushas* and less of the undescribable variety?

8

The Duties of Human Beings

Dr. Prem Kirpal's carefully worded approach to the problem of human values does include the prime need, as he rightly put it, 'to take charge of one's life' in its various dimensions in *a fast-changing and uncertain world*, in an effort to retain the essentials of one's personality and further develop it to the extent possible. He referred to the well-known modalities of achieving this: austerity, self-discipline, sincerity, intensity, etc., not to speak of developing one's own proper image and yet love for one's fellow human beings in order to be of service to them. With reference to the last mentioned aspect, he also brought in the necessity of having to deal with inequality of wealth and power. All these ultimately would subsume the exploration of the human psyche.

It was in this sense, and following Dr. Prem Kirpal, that I had made reference to the problems created by a world of increasing interdependence—interdependence not only to satisfy each other's needs in physical and economical terms, but also the (increasing?) spiritual needs. It is here that we confront some difficulties, chiefly on account of (unresolvable?) pluralism in the national and global spheres.

The Indian concept, which is sufficiently wide and universal to meet with the situation, would be the popularly known and commonly uttered daily prayer: *smastah loka sukhinoh bhavantu*. This concept has the merit of being not only univer-

sal but also sufficiently secular; in any case, we have not heard of any religion saying anything to the contrary. For achieving not only conceptual clarity, but also ensuring the feasibility of actualising the concept in real life (they appear to be vitally interlinked) one has to underscore the importance of needed adjustment and understanding in terms of human love, empathy, of notions of right and wrong. We have also to develop modalities of communication which may be of help. The insight that even truths should not be told or asserted in unpleasant ways (*apriyam na bruyat*) might ensure peaceful and harmonious coexistence in a highly pluralistic society/world. Only such communication can help build bridges of understanding between various cultures, subcultures within the same cultural system, nations or countries, regions, etc.

Any attempt to interpret or reinterpret older culture, in a modernising world, should endeavour to assimilate cultural values as a whole without any loss(es), without any fragmentation. Modern anthropology has given us sufficient insights in order to understand societies in terms of cultural wholes, insights which are sufficient to broaden not only man's vision, but his capacity for understanding and adjustment. This has probably some relationship to the necessity of avoiding mere conceptual approaches to human values. If they are to be sufficiently meaningful, they have to be co-equal with and fit into not only our present human predicament but even at any later point of time. It was to emphasise this point that I had referred to the Marxian expression *praxis* which was employed by Marx to harmonise (integrate?) theory and practice. I had given the Vedantic equivalent of *jnana* not only meaning knowledge in theoretical terms but the same being supported by the required optimum action. Prof. Mahesh Tewari has told us that the Buddha also had said the same thing.

In modern parlance, this is nothing but humanism, probably a new humanism, acceptable to all: Dr. Prem Kirpal has rightly stressed that humanism adequately reflects the quality and *sensibility of human relations* (i.e., based on *compassionate*

love and mutual understanding—in other words, a relationship which will support man's respect for *justice* and man's *solidarity*. Without these essential requirements, it would be vain to hope that human value of any kind may be able to withstand the test of the same gaining acceptance or endurance.

It may be helpful to recall what Teilhard de Chardin has so insightfully said: that human civilisation has not even tapped the surface of love. Man's growing capacity to actualise his potentialities—in the sense in which Sir Julian Huxley visualised it—which would obviously take in not only the actualisation of skills, scientific or technological, but also his capacity to love his fellow men. He said: 'We, mankind, contain the possibilities of the earth's immense future, and can realise more and more of them on condition that we increase our knowledge and our love.' One cannot love one's neighbour unless one can love him adequately, which again would imply that he is aware of and sensitive to his suffering and the oppression due to social inequality, and so on. There are so many who are not able to have the good things of life in any significant manner; a few alone seem to enjoy a monopoly of them. It was the sensitive Marx who was able to shock humanity concerning this distressing feature comparatively recently.

The older Indian Vedanta was able to visualise the human summit: the benefits that one enjoys in life being the products of cooperative action from all beings and things in the universe; no one can afford to appropriate anything for one's own personal satisfaction. The Hindu *smritikaras* appropriately talked of man's *rinas* or debts. This is implicit in Gandhi's ideals of both trusteeship and *ahimsa*, which were shared later by Dr. Martin Luther King. Gandhi had the perspicacity to know that *ahimsa* and Truth are two sides of the same coin; *himsa* is only the other side of truth. This is easily understood if one can understand that no one would have any need to speak the untruth, unless one feels that one would not get what one wishes by speaking the truth and hence resorts to untruth in order to get that from another, or to even retain anything. This is, ac-

cording to the Mahatma, *himsa* or violence, perpetrated by one on the other. In such a case, the resort to falsehood is for pressurising him to part with something which he would not otherwise part with, or to forego something (may be even unjustly or improperly) retained by another.

When a person becomes aware that he had been so pressurised, to part with or forego something in the aforesaid manner, he would feel, naturally, a sense of being deprived of something. In Marxian language, this makes him suffer from a sense of alienation and consequently, of frustration.

The socialist jurist Proudhon regarded property itself as theft (1860). Properly understood, Proudhon was possibly speaking of a man being deprived of the full benefits of his labour: when this happened, Proudhon had no difficulty in regarding the same as theft.

When the sense of alienation becomes endemic, or when society internalises, or tends to internalise such alienation, despite the frustration suffered by individuals in that society, a hiatus is created between individual ascription and social well-being.

Anomie is thus a breakdown, as it were, in the social structure. This occurs whenever there is 'acute disjunction' between the cultural norms and goals and the socially structured capacities of members of the group in accordance with them. There may well be 'psychological states'. In the extended (or distorted?) sense, alienation is sometimes taken to refer to an objective social condition, to be identified independently of people's feelings and beliefs and people living within 'reified' and 'fetishist' social forms; the task then may be to make them 'conscious of their history' for they have been 'unconscious' till then—in an endeavour to help transformation of the relations of man with himself. In the extended sense, frustration may also be synonymous with frustration of any kind and in every direction of human experience, whenever basic emotional desire is frustrated. In such a situation, linguistic analysis is a helpful tool; in the tradition ushered in by Noam Chomsky, we ought to submit

not merely the language, but perhaps even the cultural idiom, to linguistic analysis to bring out from under the surface of such expression the extent of alienation and anomie and consequent frustration that may exist.

The gap between profession and practice seems unfortunately to be always increasing. A singular example of this will be our *dharmic* society, though this may be true of any religious society or theocratic state which has become encrusted. While Hindu ideals, particularly social, have remained very high, individual performance has been falling increasingly short of that ideal. One sad feature of this has been that the excellence has emphasised the fall, which has been so great as to permit the misutilisation of the professed ideal, as a mere cloak to cover the decadence of the individual falling from such an ideal.

Understanding cultural wholes is indispensable for viable humanism, but the language or idiom of the culture itself often becomes distorted. If this had happened so completely as to destroy altogether the *dharmic* society, then there will, perhaps, be nothing more to worry about. But it seems that despite such decadence, alienation and anomie, there is still a residue of Indian culture, for the Indian culture has doubtless suffered from several distortions—by reason of—to use Western terms, alienation and anomie. What shall we find, or expect to find, when we explore this basic residue? Would it be that the great potential can be unearthed or discovered by exploring the human psyche, which may have, hopefully, the clue to reconciliation of one's inner with the outer (one's environment)? This first among our all-time great *Upanishads*, the *isavasya* speaks of the *yoga*, or joining, of *jnana* and *vignana* (the inner and the outer respectively). We find an echo of the *isavasya* in Chapter 9, Verse 1 of the *Gita* as well. It is, in simple terms, a case of the individual proceeding inner-outward rather than conversely.

I hold it as self-evident to most Indians, however debased they may be today, that they can still feel in their bones that they have this potential. Such a feeling is probably absent in

their Western counterparts, by and large; they seem to be exclusively preoccupied with the outer and not the inner (in terms of man's spiritual values). This is what makes India highly relevant to the world of today. If we analyse man's predicament, we may hopefully discover, even if it has to be discovered for the first time, Integral Yoga of the inner and the outer, and also hopefully see it as the only way toward the new humanism we are seeking. Humanism has always been a value exceedingly worth our while to strive for. Once we reach this, we may be at the threshold of solving most of the major and, apparently insoluble, difficulties confronting us at the present time.

In the above light, I shall now refer, purely by way of a few samples, to some of the ideas enshrined in the *Gita*, doubtless a work of great import, with reference to the need for man to engage himself in worldly activity, in the backdrop of the transcendental Vedantic truths that were uttered.

a) *Yogastah kuru karmani*: Fixed in *yoga*, do thy work (II.4).

b) The renunciation of any duty that ought to be done is not right (XVIII.7).

c) Action done under great strain, by one seeking only to gratify his desires, or impelled by self-sense is *rajasaic* or impelled by passion (XVIII.24), even as that done through ignorance, without regard to consequences or to loss and injury, and without regard to one's human capacity is said to be 'dullness' (XVIII.25). On the contrary, action which is obligatory and performed without attachment, without love or hate by one undesirous of the fruit is said to be of 'goodness' (XVIII.23).

d) Better is one's own work carried out imperfectly, than that of another carried out perfectly (XVIII.7).

e) *Yogah karmasu kausalam*: *Yoga* is skill in action. The expression employed in XII.16, *anapekshah suchir daksha*, etc., (he who has no expectation is pure, skillful in action, etc.) also conveys the stress laid on not only action, as the expression employed here, *daksha* will show.

The expression *dhyana* employed in the phrase (*dhyanat karmaphaltyagas*, etc., XII.12) has been interpreted by Sridhara as *avesa*, i.e., directing the spirit upwards to the Divine. The *Surya Gita* regards as the best individual one who realises that devotion is better than knowledge, and desireless action is better than devotion.

f) Renunciation of work and unselfish performance both lead to salvation, but the latter is better (V.2).

g) After a lot of explanation as to what is work and what is inaction (*kim karma kim akarme'ti* IV.16) the statement made is: Having abandoned attachment to the fruit of work, ever content. Without any kind of dependence, he does nothing though he is ever engaged, i.e., his work or *karma* does not bind him (IV.2). Even work suited to one's nature should not be given up, though imperfect.

All this is not mere utopia. The following most practical and realistic statements will show how small steps, genuinely taken, are regarded as important:

h) Let him gain, little by little, tranquillity by reason controlled by steadiness. (VI.25).

Only after such practical and realistic steps are taken would the *summum bonum*, as indicated, become feasible *sarvadharman parityajya mam ekam sarnam vraja*—abandoning all duties come to Me alone for shelter; the promise held out later is, 'grieve not. I shall release you from all evils' (XVIII.66). This has no doubt to be read in the light of all the other affirmations concerning the need to engage in unselfish activity: for instance, the need to act continuously, taking refuge in the Lord (XVIII.56) and inertia or non-action—not being the ideal (XVIII.2). The above is at once a promise and a faith demanded, based on 'the reality of saving wisdom and man's capacity to attain it.' (S. Radhakrishnan, *The Bhagavad Gita* 1949, p.238).

It would be sufficient to set out the above statements to indicate the gap between the cultural objective and the fall. The cultural objective, even if it is no more than a mere 'cultural

myth' shall still be still sufficiently powerful 'to think itself through people's minds,' as any such myth is believed to be so capable by Levi Strauss, the famous French cultural anthropologist. Even disconnected and as yet meagre evidence of man's spacious cultural experience shows the universality of man's striving for excellence (see, *The Spatial Organization of Culture*, edited by Ian Hodden).

It is for these reasons that Sri Aurobindo has talked so much about Integral Yoga: combining knowledge, work and love. He also gave us the technique: the *sadhana* of surrender to the Divine, after turning to it and aspiring for it intensely; he called this the 'master key'.

The descriptions, so various and full in the *Gita* of the person who is rewarded as the best (pursuing excellence) indicate even in material terms, what he is, how he looks, and how one can know him. Such a question had been posed by Arjuna to Krishna even earlier:

II.54: sthitaprajnasya ka bhasa
samadhisthasya kesava
sthitadhih kim prabhaseta
kim asita vrajeta kim

It has been rendered by Radhakrishnan as: 'What is the description of One who has this firmly founded wisdom, whose being is steadfast in spirit, O Kesava? How should the man of settled intelligence speak, how should he sit, how should he walk?'

Radhakrishnan explains this *more* fully:

> Though they have their roots in the Hindu religion's organization, they grow above it and by their freedom of mind and universality of outlook are a challenge to the corrupting power and cynical compromises of the authoritarians. Their super social life is a witness to the validity of ultimate values from which other social values derive. (*ibid.* pp.122–123)

Surely there cannot be more detailed attention paid in practical terms than what is attempted here.

Sir S. Varadachariar, former Judge of the Federal Court of India, had posed, in his Radhakamal Mukherjee Memorial Lectures, the question whether the *vyavharika* (pertaining to litigation) chapter of Hindu jurisprudence—which also contains a preponderance of the ideal element, the 'ought', over the 'is'—indicated a mere utopian projection. He dismissed this summarily, for the good reason that it could not have happened that attention was paid to so many practical matters, with such minutiae, if the same had been mere speculation about the ideal way of life. The said answer has some relevance here.

The search for human values cannot avoid what humanity has been capable of in the past (maybe even the somewhat distant past). It will be no less important to consider even what they talked about, for understanding this global and eternal theme; one must have adequate regard for even literature as an expression of any culture. Even for merely projecting what the future ideal shall be, one has necessarily to build from what was there previously; in this compendious sense: the search, therefore, for continuities is a must.

Not being content to merely refer to the Hindu cultural context, I wish to supplement briefly with the less known Russian. The mature Harvard sociologist, Prof. Daniel Bell, has said a lot, in the course of his prolific writings about the current Russian experience. One may usefully read these, collected under the title, *The Cultural Contradictions of Capitalism*. After referring to culture for a society being a group or a person, as a *continual* (emphasis added) process of sustaining the identity through the coherence gained by a consistent aesthetic point of view, a moral conception of itself, and a style of life that exhibits these conceptions in the objects that adorn one's home and oneself in the state which expresses those points of view (pertaining to the realms of sensibility, emotion and moral temper, and the intelligence, which seeks to order these feelings, p.36) and to the several meanings of culture, he seems to indicate that even a society like Russia's, which has adopted an authoritarian

regime, may throw it away when she realises her continuity with her rich cultural past.

'Continuity with the past,' the great American Judge Oliver Wendell Holmes reminded us forcibly, 'is no duty.' In other words, one should not strive to find continuity where there is none. I may take this occasion to point that what is continuous (discovered to be so despite apparent discontinuities) is what is more important for our theme: myths, powerful cultural myths, especially in a context where—as Dr. Radhakrishnan has pointed out in the *Bhagwad Gita* (ibid, p.98)—there has been an 'inward culture' 'socially' practised. Without doubt, all the statements that abound in the Indian Vedantic literature were not mere idle projections, or speculations by an idle people, though written so long ago. Despite the usual incidence of primitive religion and later corruptions getting inextricably into any cultural streams, the *Vedanta* appears to give so much room to hope for man's better future. Mankind has been always seized by panic; the panic today seems greater than ever. The fortieth verse of the second chapter of the *Gita* assures us that 'even a little of this' (*dharma*) 'saves us from great fear.' The single aim of the *Vedanta*, if one may take the risk of simplifying it in that way, is to help man journey from fear (*bhaya*) to fearlessness (*abhaya*). When the psyche is fully explored, it may hopefully be found that, despite man's tendency for evil, there is a hard core in him which is good—the sum total of his personality, however, as Tagore said, consists of both good and evil. This is what Blaise Pascal said: it is not good to remind a man always that he is an angel or that he is a beast; it will be good to remind him of his being both. Shorn of fear-panic, it seems he may become totally good.

Without doubt, as indicated earlier, man has actualised his potentialities in a much greater measure than his primitive ancestor was able to do. The opening of the Pandora's box of man's potentialities has also allowed many cataclysmic forces to escape from inside it; they threaten to annihilate him. But the

potentiality which has been unearthed in the process of this opening or churning (*manthan*) has also put out so much colossal evil that we need another force (Shiv) to absorb these evils. This force is ultimately the combined operation of everything good and noble in man, chiefly his love for his fellow man and *all* sentient beings. This alone can contain not only the evils which have already become manifest—our growing capacity to destroy ourselves—but also prevent even greater evil manifesting.

The development of man's consciousness, globally speaking, of his potential for both immense and quick progress as well as for speedy and colossal destruction at the same time, despite the great tensions and conflicts it has produced, is what is probably holding man back from his impending doom. Never was there, at any time before the last quarter century, such progress made by man to establish verily a paradise on earth; never was it more feasible at the same time, to meet with his doom so quickly on this scale. This actualising potentiality for such good and such evil has released in us—one can see unmistakeable signs of it already—the dawn of enlightenment and hopes of meeting with the threatened doom. Shortly after World War II—after Hiroshima—we could not give ourselves, in the most optimistic sense, anything more than only a few years before we met with total annihilation; the fear was that man would lose in the race against time before he became sufficiently wise and capable to save himself. Our 'remission' has been slightly longer than our best hopes, hitherto; yet our armaments-race has not been effectively halted. We have had a powerful warning in the accident at the Three-Mile-Island nuclear plant. The power-mad politicians of the world do not appear, as a class, to be closer to sanity than ever; a heroic few among them do hold out hopes for a saner world.

Since the turn of this century—at least after the World War I, in any case—mankind has been in its greatest shifting mood; but our need for not merely quick thinking but also quick acting in the required manner and measure seems to be *now*.

9

Secularism and the True Understanding of Religion

THE IMPORTANCE OF national integration is not questioned by anyone; even those who seem to do their utmost to undermine national integration know only too well that they will not even be listened to by anyone unless they at least outwardly make it appear that they stand for national integration! Surprisingly, however, we are feeling compelled to propagate the need for this. I have no doubt that this is only due to our excessive allegiance to what appears to be no more than a mistaken understanding of secularism and a fanatical (almost irrational) attachment to one's own religion, mother tongue, place of birth, and generally, cultural attitudes fostering excessive parochialism of any kind.

It seems to me that I cannot do better than begin by quoting C. Rajagopalachari, fondly called Rajaji. In his introduction to M.S. Subbulakshmi's recording of Shankara's *Bhaja Govindam,* he said, in his own inimitable way :

> The way of devotion is not different from the knowledge of *jnana.* When intelligence matures and lodges securely in the mind, it becomes wisdom. When wisdom is integrated with life and issues out in action, it becomes *bhakti.* Knowledge when it becomes fully mature is *bhakti.* If it does not get transformed into *bhakti,* such knowledge is useless tinsel. To

> believe that *jnana* and *bhakti*—knowledge and devotion—are different from each other is ignorance.

Words of greater profundity and depth, conveying a true understanding of the Indian cultural ethos, and with greater relevance to our contemporary times, may be difficult to recall.

It is this 'oneness of jnana and bhakti,' to quote the words of Rajaji, that makes for the oneness of Bharat. The Truth is indeed one, but people call it by different words; it is that *Oneness* of both *jnana* and *bhakti*—in short, *bhakti-jnana.*

Our founding fathers, who adopted the motto that truth alone succeeds (*Satyameva Jayate)* meant our Constitution to be secular. What is meant by secularism has been the subject of much discussion.

The Preamble to the Constitution was amended by the forty-second Amendment with effect from 3.1.1977, to read: 'We, the people of India, having solemnly resolved to constitute India into a "Sovereign, Socialistic, Secular, Democratic Republic" etc.' Prior to that amendment, it only read as 'Sovereign, Democratic, Republic.'

Whatever might be the manner in which the amendment to the Preamble should be construed, there can be no doubt that secularism is the underlying and basic concept of the Constitution.

There is no separation here between Church and State of the American variety. According to the American view, even where the State helps all the religious denominations equally, it is unconstitutional, because the underlying doctrine is not that the State is to help all, but it should help none. This is inverted in our Constitution; Articles 25 and 26 extend protection in equal measure to all, in respect of freedom of conscience and the right to freely profess, practise and propagate religion. There is thus a positive, not merely negative content; the good of all citizens has to be ensured and promoted; this does take in persons belonging to different religions and adopting different religious beliefs and practices enjoying the equal protection and

even help of the Constitution. Such help, when given, should not be discriminatory. Citizens must be left free to work out happy and harmonious relations amongst their religions, and have this quiet but separate peace.

The same meaning attributed to the expression 'secular' in the decisions rendered prior to the forty-second Amendment, would seem to continue to apply even after the Preamble to the Constitution has been amended. The greatest factor which rebounds to the glory of our founding fathers is that the constitutional protection under Articles 25, 26 etc. extends not only to theistic and non-theistic religions (like Jainism and Buddhism)—that is, the entire system of belief or non-beliefs—but to the practice and propagation of them as well; this is the sweep of freedom of conscience.

As a student of law in the year 1935, I heard Dr. Radhakrishnan deliver an address, in his characteristic incisive and insightful manner, on 'Religion in a Changing World'. I distinctly recall his having referred to a writer of the eminence of G.K. Chesterton drawing out his evening desk to write an obituary on religion. It was then a serious question whether on account of the impact of science and even nationalism turning aggressive, religion had practically died. Dr. Radhakrishnan explained that aggressive nationalism was one form of religion, with the fanaticism and bigotry associated with religion. Today, however, when we are much more familiar not only with science and technology but also their fallouts (both good and bad) the initial forceful impact of science on the human mind is no longer there. The material and spiritual values (commonly so-called) were not understood as capable of coexisting. It was difficult then to perceive what the Mother of Pondicherry had been able to explain so meaningfully that when mankind began to make a distinction between matter and spirit, the progress of human thought and experience suffered a serious setback. It was she who was able to explain so comprehensively and in depth what is now being elaborated as Divine Materialism.

We owe to the all-time great, Arnold Toynbee, a proper understanding of the major religions of the world. He classified them into introvert and extrovert religions from the psychological angle; according to him, Islam and Christianity are extrovert religions, while Hinduism is an introvert religion. He was only highlighting what is happening in our increasingly shrinking world of today; universality, not to speak of catholicity only, is what can have true religious appeal. The hallmark of Christianity and of Islam, doubtless two great religions of the globe, each of them comprising nearly a third of the global population, is the propagation of brotherly love in an universal frame. But each of them insists upon an indispensable and fundamental faith in Christ or the Quran, as the case may be; each of them confines the possibility of redemption to only those who would share such a belief; yet, they are overly concerned with sharing of love for their fellow human beings; this is to the extent of each of them being anxious to bring as many of their fellow human beings within the pale of redemption as possible, which for each of them can only happen by conversion to their own faith. Referring to this aspect, Arnold Toynbee (in the seventh volume of his unsurpassable *Study of History*, postscript), refers to a letter written to him by a fellow Christian, accusing him of speaking in the manner of anti-Christ and reminding him that he was a devout Christian—a Catholic himself. It was in the course of his reply to this letter, that Toynbee has tellingly brought out the aspect of the intensely introvert nature of Hinduism, placing a premium upon an individual seeking his own redemption and not being apparently (despite his always wishing humanity well) concerned with the redemption of his fellow human beings, still conceding to all his other fellow beings the possibility of redemption, even to those persons with either diverse faiths, or to those who do not believe in the Divine. In other words, a person who did not even believe in the Divine could also, by the Divine Grace, be ultimately converted and be redeemed. An important tenet of Hinduism, which by itself led people to doubt whether Hinduism is a religion at all, is that

when a person does not even believe in the Divine, or even positively denies the Divine, he could still be within the pale of redemption. In fact, *Charvaka* is a branch of Hinduism; apparently atheistic in tenor and intent, it underscores the basic idea that it would not at all hinder spiritual evolution if a person is bona fide unable to postulate the Divine, and is even persuaded to deny the existence of the Divine. This is the opposite of blind faith. If some of the great religions of the world are even critical of idol worship, this is due to their failure to appreciate Hinduism insisting on qualitative belief, *bhakti* based on *jnana*. To the devout Hindu, however, even when faith is blind to start with, ultimately his faith is likely to be qualitatively transformed. What is only blind faith to start with, becomes faith in the full sense of the term when it acquires *bhakti-jnana*. This is the essence of the process of understanding *bhakti*, which Rajaji has described as *bhakti-jnana*. One has, therefore, to only understand the true scope and nature of *bhakti*.

After all, *bhakti* is nothing but the love of Divine itself, subsuming a capacity to live. As Teilhard de Chardin has pithily explained, mankind, which is still to actualize its full potentiality for love, has not yet learned to even scratch on the surface of love. He therefore believes that human beings can increasingly actualize their potentiality for love as they have actualized their potentiality in many other fields: intellectual, scientific and technological. Only when man actualizes his full potentiality for learning would he reach a stage where he would be truly able to say (and to mean it) that love of fellow men is the love of the Divine. This is the case of several of our Hindu religious denominations, especially the Srivaishnava denomination, as practised in the south, namely, that the service of man is the service of God (*Manava Seva* is *Madhava Seva*). The entire subcontinent echoes the sublime sentiment of *Vasudhaiva Kutumbakam*, one universal family under the Divine.

Coming from the south, I have been naturally greatly influenced by *Thirukkural*, a great Tamil work attributed to Thiruvalluvar. It is believed, despite lack of sufficient historical

evidence, that he was a Jain. Jains deny the existence of God. But we find him commencing his great work by invoking the Divine and describing the Divine as being the first (source) like the first alphabet of all languages. I would also like to call attention to what Albert Schweitzer explained in *Indian Thought*—that even the *Gita* (of the *Mahabharata* period) only tolerated activity at best, but it was *Thirukkural* which actually enthroned activity. Dealing with the problem of Free Will versus Determinism, Thiruvalluvar claimed that even if so-called fate or destiny should be against a person, his self-effort as such would give him due reward. This is a sentiment the echo of which we find in a great thinker like Emerson, who liked to think that by his cultivating his own personality in the manner possible for him, he would be making God his debtor, because even God, who created him, would like to be under a debt of obligation to him; he was conferring upon God the great pleasure and pride of having created such an excellent human as himself! This was indeed the sentiment of the great Rishi Valmiki, who wrote the epic *Ramayana* when he described Rama as a person of great quality (*gunavana*), the highest potential of man being actualized so as make him God himself. This is the principle of *Uttara*—of man becoming God, as distinguished from the concept of the *avatara* of God, descending from his sublimity to become man. In Aurobindonian terminology, it would be involution and evolution respectively. It was the latter approach which alone the great Tamil poet Kamban was confident to adopt, when he wrote his great poetic work on *Ramayana* in Tamil. He conceded that what great Rishi Valmiki had accomplished, converting man into God, was a task beyond his competence; he would, in the traditional manner, only speak of God taking the form of man (for the purpose of fighting evil and establishing righteousness on earth, as the *Gita* says: *Sambhavami Yuge Yuge*). In more recent times, Thomas Mann said, 'To man, time is given like a piece of land, as it were entrusted to him for faithful tilling, a space in which to strive incessantly, achieve self-realisation, work onward and upward. Yes, with the aid of

time, man becomes capable of meeting the immortal from the mortal.'

If we turn to the evolution of Christianity, from the initial supposition that man could not by himself face God alone, the reformist Martin Luther proclaimed that man had sufficient significance and strength to face God alone and by himself. These doubtlessly indicate the various steps in the evolution of human beings in their journey towards the Divine. It may be that, in the language of Sir James Jeans, it is intellectual laziness, not being able to think further backwards at some point to understand how the material universe, including our globe, came to be formed, by postulating the Divine or a Creator. But then there have been scientists also of the order of Einstein who could not but postulate the Divine and regard it as proven. This kind of debate is bound to go on until such time as man can settle down by coming to terms with himself. Hindu pantheism, which was an effort to accommodate every faith (even non-faith) within the bounds of Hinduism, gave rise to the practice of idolatry. This deeply disturbed the Muslim brethren and even shocked them to the extent of having to either convert, or even get rid, of the Hindu if he could not be converted. Even in the case of Christianity, there were persons who wanted to create a free Church, as distinct from the traditional Church, which interposed man (a priest) between God and man. The counterpart of it might be the interposition of the *archa* (idol) by Sri Ramanuja, according to the *Agama Shastras* or the *Acharya* later by Sri Vedanta Desika.

Whatever the approach of man might be from time to time, the fact remains that the *rishis* of India had, in their great wisdom, fully apprehended or at least glimpsed the interplay of reason and non-reason. This is also debated in Western philosophy as rationalism versus irrationalism. In the *Rig Veda*, the question has been posed as to who would be the *rishi* after the *rishis* of the Rigvedic period became unavailable for guidance. The cryptic answer would be the *rishi*. A *rishi*, in the ultimate analysis, is only a seer: one with the capability of being able to per-

ceive deeply behind the surface of things. This projection was carried on to such an extent in the Vedanta that the difference between the perceiver and the perceived itself could vanish at one stage. A modern parallel for this would be what is happening in the field of modern physics: the person who conducts an experiment becomes himself a part of his experiment.

It was Martin Luther who pointed out that fear due to irrational causes could not admit of rational solutions; if the fear in the mind of man could not be accounted for by anything for which he could discover a rational cause, such fear would not admit of a reasonable answer; it could only be irrational: faith indeed being regarded, to start with, as a good enough answer, though regarded as irrational. This is man's journey from *bhaya* to *abhaya*—fear to fearlessness. Later thinkers, particularly Sri Aurobindo, have made it possible for man to discover and actualize his potential for even training his intuition in a rational manner—this is his *sadhana* of marrying the *Vedanta* to the technology of *Tantra*. Some of these approaches are only briefly indicated here, in order to convey at least roughly the grand panorama of man's evolution to reach his ultimate destiny as 'Superman' in the Aurobindonian sense. This will make sense if we recall that at least at some point of time during man's evolution, he acquired the gift of not only being aware, as all animals are aware, but also become self-aware (which is not possible for animals). It was this self-awareness, in other words 'ego', which underwent fuller development later on, to the extent of man becoming even self-destructively egocentric.

The great *Upanishads* of India, which a scholar of the eminence of Schopenhauer said were the solace of his life, and were going to be the solace of his death, do not even reveal the author(s); this is indeed typical of all the works of those great personalities like Thiruvalluvar, the authorship of *Thirukkural* itself being difficult to fix precisely, the author not even giving an indication of the religion to which he belonged.

My grandfather, who was a great scholar, lawyer and *vedantin*, asked me when I was young, whether I could believe the

Upanishads were God revealed. When I truly told him it was difficult for me as a rational person to believe it, he asked me further whether I would myself choose to be anonymous if I wrote something of which I could be proud. I answered him again only in the negative. When he still further asked me whether the person/persons who had written that really great work and still chose to be anonymous could be regarded as even greater than God, I had to reply in the affirmative.

The Indian way of life is one seeking the maximum power over oneself and the least over others. In a country which taught the great truth of learning making a person humble (*Vidyam Vinayasampannam*) there is amusingly enough the strange paradox of a person with even partial learning becoming so immodest as to become conceited because of his learning (a little knowledge being dangerous).

Judged by these criteria, it would follow that there is great wisdom in the statement of the *Rig veda* that after the *rishis* of the Rigvedic period disappeared, the *rishi* would be there to guide. The reason would be that the *rishi* was needed by mankind. But then, after perhaps hundreds or even thousands (we do not know accurately yet) of years, when we come to the *Mahabharata* period, we find the same question, put to the *rishi* of the Rigvedic period, repeated once again. The answer this time was different: 'Do not go by your reason alone, because you can reason away even morality. If you have any conflict between what your mind dictates and what you desire, do not go by your reason, but find out how some of the old persons, for whom you have regard, have acted and behaved under similar circumstances.'

This is the same conflict which mankind perceives today! The conflict is between a person's mind and his heart. The acute problem of today is seen by the most perceptive as to how to win the hearts and minds of men, not merely the latter.

In this predicament, it is no longer possible to appeal to his mere reason; he has to find out, by true search within himself, as to what he would himself like to do; treat others as he may

like to be treated by others. Foreign observers, even a decade or two earlier, were able to see clearly this remarkable phenomenon of an Indian exercising more power over himself and less over others. It is indeed unfortunate that there is declining evidence of this today.

There is yet another profound aspect. The cult of desirelessness is *sadhana*, which is really aimed at desires of man becoming totally for the Divine. In the ultimate analysis, it is open to any to choose the Divine, rationally or irrationally. It would be better if it is the former; it was explained by Sri Krishna in the *Gita* that among his devotees he prefers the *jnani*, the knowledgeable person; a person with *bhakti-jnana*, as Rajaji has explained, will connate the meaning of this expression. It was left to Sri Aurobindo to explain how a new religion was the need of the hour, necessitating all these three approaches of *bhakti*, *jnana* and *karma* being united/integrated (he called it integral-yoga). Whichever way it may be, whether it is the way of God or no God, whether it is a question of worshipping idols or not, whether it is regarded as a mere intellectual perception, or pure emotional attachment to God or both, it seems certain that man needs God. It was Voltaire who said that even if God does not exist, we have to create one. Will Durant points out that man may destroy and demolish the previously known gods, but, even like the old myths he has got rid of, he created new myths, and is creating and will create new gods in the place of those older ones whom he slays. No longer does man appear to be disturbed by God.

It is in this larger setting that the concept of secularism in India has to be understood. There can be harmony among the various religions of the world; in the Indian subcontinent, all of them have a hospitable home, where they can and will coexist. This is, in my view what is meant by 'secularism,' the State maintaining not mere equidistance from all religions, but enabling true tolerance, and extending to all of them the equal protection of the Constitution.

It seems to me, unless I am grossly mistaken, our concept of secularism is the unique product of India's spiritual past. It does not consist in mere toleration, by one religion of another or others, but in the constant rediscovery, by each one of them, of the elements conducive to *Universality* in each of them, in a rapidly shrinking world. The true end of every religion worth its name is the search of Truth, which is one, though people call it by different names, as for example, in the hymn *Iswar Allah Tere Nam*; the practices taught by every religion are doubtless to help man not only to bind himself irrevocably to, but constantly rediscover, that Universal Truth.

10

Women and the Law

The natural superiority of women is a biological fact, and a socially overlooked piece of knowledge. — A. Montague

IT IS SIGNIFICANT that if the U.S. Supreme Court took almost a century to address itself to the problem of racial discrimination, it took more time to extend the equal protection guarantee in cases of sex discrimination. The existing Equality Clause, as it is called, of the Fourteenth Amendment provides that no state shall 'deny to any person within its jurisdiction the equal protection of the laws'. The Due Process Clause, as it is called, of the Fifth Amendment has been considered to mean to embody an equivalent protection against action by the Federal Government.

But the decisions of the Supreme Court, not only against a woman, but also in her favour, have assigned a 'separate place' ('a clause by herself') to a woman, while applying the said clauses. One such decision, supposedly in her favour, was *Hoyt vs Florida* (368 US 67 at 62) rendered as recently as 1961, which upheld a Florida status excluding a woman from jury service, unless she voluntarily applied—thus placing her at 'the center of home and family life'!

It was fourteen years later that the Court reversed itself in *Taylor vs Louisiana* (419 US 522 at 537). In that matter, it ruled that exemption from jury service was unconstitutional and that

'if it was ever the case that women were unqualified to sit on juries or were so situated that none of them could be required to perform jury service, that time has long since passed.' More than a thousand laws existed in the US discriminating against women. The demand for equality of rights before the law was itself seen as a part of the broader demand by women for getting rid of their sex-role determinism.

What is this sex role determinism?

It has to be considered on par with race or any other handicap usually 'locked in the accident of birth'. The relevant factors are along a continuum. Such considerations, not only pertaining to women, but in the wider context of all forms of traditional discrimination (as, for instance, based on the caste system, oppression of all economically/socially backward classes like Harijans, etc., in India, or of the blacks in the United States) have been broadly based on criteria—permissible or impermissible, acceptable or unacceptable, customary or legal, social or individual.

How are these to square yet with the accepted standards of excellence or appropriateness?

Analysis of discrimination and search for answers remind us of Dr Martin Luther King's classic phrase that 'he had climbed the mountain and seen the promised land'; but what he had seen was 'only a plateau from which new mountains became visible'.

In the long history of mankind, from the dim past to more recent times, we find that the newborn baby has hitherto received only differential treatment from others in any environment; east or west; south or north. It would be sufficient to refer to one expression known to law—'testify'. It means that one swears by his testicles—a transaction which only the male could consummate!

The idea that a 'bad' woman is much worse than a 'bad' man survives even today; this can be traced, in the American scene, to the witch-hunt days of the American Colonies. Equal

protection has not been given to the woman on a vast spectrum of grounds, which include 'paternalism'.

Though American courts are gradually striking down laws barring women from certain jobs, and even though American women began (at least since the 1970s) to search for jobs in traditionally masculine fields—even telephone pole climbers, not to speak of airline pilots—it is truer to say that American women, by and large, are still shaping their action along certain lines to avoid being considered unfeminine. As a result, traditional life-styles persist for men and women—in which marriage, child raising and child rearing are perceived to be the woman's central role and work to be man's.

The male—female earnings gap in the US was seen to be growing wider; from 4,713:3,008 dollars annually in 1957, it was 10,200:5,903 in 1972 (*US News and World Report*, October 8, 1973, pp.41–42). They have remained in low-status occupations, with a few more occupations being added in the last decade to their usual occupations. Despite the Japanese Constitution of 1946 guaranteeing economic, social and political equality to all citizens, regardless of 'race, creed, sex, social status, or family origin', wage gaps at every level of education and skills is the rule, and women's wage decrease as they age (except in the case of civil servants) and the retirement age is also lower. Despite the Equal Pay Act and Sex Discrimination Acts in the UK, there are disparities, which are left to the EEC to redress.

Added to this is the hard fact that child-care facilities, even in advanced countries like the US and Sweden, for working women are not what they should be. This is what, in practice, greatly inhibits mothers from working.

In Russia, women have taken to items of work like ditch-digging, plastering, carpentry, etc., in order to secure adequate wages, since they are usually paid less than men. Russian men seem to help their women less than their capitalist counterparts. This is not uncommon in India either, where women are seen doing hard manual work in the fields of agriculture and the

construction industry and in some places, are seen pulling heavy hand carts as well. The women of India, like their counterparts elsewhere, have borne the brunt of all this inequality for centuries; what may probably distinguish them from the rest is that they are still left with a more perceptible level of cultural literacy. In India, as in the US, the woman probably constitutes the majority; the difference, even here in India, is that the majority is nearly silent. Optimum utilization of this as yet untapped and vast human potential is intimately connected, not only with the securing of human rights in this subcontinent, but also its development.

Modern woman has equaled, in many cases, and in a few even exceeded, man's physical capacity, especially in the field of athletics and sports. As a perspicacious observer pointed out, the Amazon, as a 'somatic and psychological type' exists; if 'natural physical differences are no longer compounded by cultural conditioning, Amazons may become more frequent'. But much more in-depth study is required to answer the questions about: 'how much male—female differences are inborn and how much are produced by socialization'.

The woman of today, if she wills and strives for it, can be more easily free of the many traditional shackles that have hitherto impeded the full development of her personality. She cannot be freed from childbearing yet (whether her childbearing time can be reduced appreciably is another question) but there are realistic possibilities opening out to reduce considerably, if not to eliminate, the constraints arising from childbearing. Among the more enlightened, active participation in decision-making concerning the desired size of the family is the rule rather than the exception.

The fast-changing attitudes in this respect are a precursor to rapid and significant changes in family structures and redistribution of occupations among the sexes. What seems implicit—and indeed sorely necessary—is that such changes should involve equal treatment of women with men, legal distinctions

based on sex having become politically and morally unacceptable. It is thus necessary to establish legal equality—to establish fully, emphatically and unambiguously the projection that before the law woman and man are to be treated *without difference* (*see* 'The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women'. By Barbara A. Brown, *et al*, Vol.80, No.5, April 1971, *Yale Law Journal*, pp. 871–985).

In the late 1950s, the Secretary-General submitted a report to the United Nations on 'Legal Status of Married Women' (Sales No.1957. IV.8 ST/SOA/35). As early as 1946, the nuclear Sub-Commission had recommended that one of its aims shall be ensuring the dignity of the wife in marriage, her equal rights to guardianship of children, to keep her nationality, and to hold, acquire and administer property. At its first session in 1947, the Commission recommended, as one of its aims, full equality of all civil rights, irrespective of nationality, race, language or religion: these included, among others, the rights of women in Marriage, Guardianship, Nationality, Legal Capacity and Domicile.

In the meantime, the Economic and Social Council had, at its second session in 1946, recommended a study which led to the above Reports of the Secretary-General. Various resolutions have been adopted by the principal organs of the United Nations concerning the Legal Status of Married Women—covering their status in private law, matrimonial regimes, right to engage in independent work, parental rights and duties, domicile, etc. These are invariably supported by detailed and competent reports. The status of women in various countries—Great Britain, Sweden, Norway, France, Russia, Israel and Senegal, was the subject of a symposium, of which the editor was Ruth Ginsling (*see* 20th Am. *Journal of Company Law* (Fall 1972) pp. 583–723). Chinese women were studied in 'Sisterhood is Powerful' (1970) (ed) R. Morgan; the legal status of those in the US, Eastern Europe, Scandinavia and Canada was studied at the Ninth International Symposium on Comparative Law, Ottawa, 7–9 Sept. 1971.

The UN system had come in the wake of the League of Nations, whose 'autonomous partner', the International Labour Organization, continuously strove to achieve humane working conditions for all, irrespective of sex. The Declaration of Philadelphia stated what was previously contained in the Preamble and the Treaty of Versailles that 'all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity'.

Though under the Indian Constitution no gender discrimination is permitted and the equality clause is extended to women, the status of women, both in law and in reality, leaves much to be desired. Many anomalies and injustices abound in the Indian scene. There has been no meaningful or massive effort yet to relate our historical experience with the task to be performed. The insightful words of Garda Learner in *The majority finds its past: Placing women in history* (1979, p.144) appear worth quoting:

> It is obvious from historical experience that legal and educational quality for women will not automatically lead to attitudinal changes essential for altering the role of housewife ... to accomplish this will demand the transforming and restructuring of all institutions of society and the creation of new forms of community.

11

Dr. Radhakrishnan's Contribution to Indian Philosophy

PHILOSOPHY IN INDIA today is in a volatile state. There are diverse philosophical interests: logical positivists, naturalists, existentialists, linguistic analysts, phenomenologists, neo-vedantins, etc.

The earlier western-educated philosophers of India derided anything which smacked of ontology or metaphysics; they prided on calling themselves verificationists. The antimetaphysical movement has now lost its ground even in England, its home. There being no philosophical movement as such in India, Indian philosophers kept on repeating what their prototypes abroad were saying; they soon became bores. The ontological standpoint, that of Dr. Radhakrishnan, is gaining ground: we may not dispense with modern logic or linguistic analysis, but they would not be in the same antimetaphysical tenor.

The earlier days of Dr. Radhakrishnan were mostly concerned with the so-called antithesis between science and religion. I have heard him speak, in the early thirties, on the subject of religion in a changing world. The ontological approach of a system of thought, which accommodated metaphysics in its own right, having been made so difficult, could still be taught by Dr. Radhakrishnan (in a manner that won high esteem), with his capacity for *samanvaya* (synthesis) as distinct from *samanya* (syncretism) in the land which gave birth to antimetaphysics.

He had to invest sharp words, even more sharply arranged, like: 'Science does not admit without proof; yet, it does not deny without disproof.'

But today things are different. Science, as we understood it then, has outlived its usefulness. Twenty-five thousand books and a million scientific articles are published each year: even computer systems seem unable to cope with the onslaught of information. American historian Theodore Roszak in his *Making of a Counter Culture* (a best seller of the late 1960s) refers to the 'mindscape of scientific rationality,' and pleads for a return of submerged religious sensitiveness.

Our scientific knowledge is screening out a range of experience: we have been learning only what is verbal, explicit, articulated and rational logic in Aristotelian terms, overlooking the equally important mystery, ambiguity, illogic, contradiction and transcendent experience. We are still measuring many things in the name of science which have little relation to the world itself, 'like a telephone number to its subscriber.' Only recently have we come to accept the perhaps most universally accepted scientific falsehood: that the scientific method is the *only* reliable way to truth; we are seeing more today in the half-a-century-old 'principle of uncertainty' which physicist Werner Heisenberg had talked about. Molecular biologist Gunther assumes that all questions in the field of subnuclear physics are about solved or close to solution. We are still, in the words of Arthur Koestler, 'peeping toms in the keyhole of eternity'.

Many scientists today believe that aspects of mysticism totally outside today's science, may come back and be incorporated within its framework. Then it will be a new science. With the scientific method and logic no one can quarrel; it would, indeed, be foolish to do so. But one has yet to contend with many problems of experience, still outside the domain of science, and it will be unscientific in the extreme for science to let this happen forever. There is a genuine fear among our country's scientists that, while science has not progressed the way it has in many other advanced countries of the world, such an attitude

towards science, or even talk about it, may neutralise science itself. I am not saying that this cannot happen. All I can say is, it ought not to be allowed to happen. The scientist, while he is true to his calling, will, at the same time, bring within his view many areas which he was content to leave out in the past. Probably, if the Indian scientist can do this, he would be the harbinger of a new science—for which humanity is waiting.

It would be necessary, while we pay our tribute to the late Dr. Radhakrishnan, to remember that here was one who could command respect at a time when science was the absolute master, and scientific philosophy itself was not so securely established.

It would be impossible to cover Dr. Radhakrishnan's overall contribution to Indian philosophy in a short span of time, unless I am choosy. But choice has its perils. An attempt, therefore, is made to present, in his own inimitable words, only some salient aspects bearing on the problem of life, and what an ontological view of Indian philosophy (which is really what it is in essence), can contribute to the understanding of this problem, at least to some small extent.

The following passages have been mostly lifted from his introduction to the *Gita*, not in any other sequence than what I regard as being helpful to bringing out how he presented Indian thought, not only to Indians, but to the world at large. I could not think of doing this better.

The traditional answer of the Hindu religion to the problem of human action, to the question 'how can we live in the Highest Self and continue to work in the world' is stated with a new emphasis. How to combine the science of reality and the art of union with reality is the province of *brahmavidya* and *yogasastra*. The truths of the spirit can be apprehended only by those who prepare themselves for their reception by rigorous discipline; we must cleanse the mind of all distraction and purge the heart of all corruption, in order to acquire spiritual wisdom. The perception of truth results in the renewal of life. The *Gita*

is not presented as a metaphysical system, thought out by an individual thinker or school of thought, but as a tradition which has emerged from the religious life of mankind; it represents not merely any sect of Hinduism, but Hinduism as a whole; not merely Hinduism, but religion as such, in its universality. It is both metaphysics and ethics. The *Gita* possesses equal authority with the *Upanishads* and *Brahma sutras*, to form together the triple canon *(Prasthana traya)*. The differences in interpretation arise due to differences in viewpoint adopted; they are complementary, not contradictory. The systems of Indian philosophy are so many *darsanas*.

On *Maya*

The world is not an essential being like Brahman, nor is it mere non-being. The sudden discovery through religious experience of the ultimate reality of spirit inclines us sometimes to look upon the world as an illusion, rather than as a delusion or as a misconstruction. *Maya* does not imply that the world is an illusion, or is non-existent absolutely. It is delimitation, distinct from the unmeasured and immeasurable. The question 'why should there be such delimitation?' cannot be answered at the empirical level.

Every religion conceives Supreme Reality as infinitely above our time order. Eternity does not mean the denial of time or of history; it is the transfiguration of time. Time derives from eternity, and finds fulfillment in it. In the figure of Krishna, the unity between the eternal and the historical is indicated. The subjective and the objective processes of the world are only the expressions of the higher and lower natures of the Supreme; yet, in whatever is glorious, beautiful and strong, God's presence becomes more manifest. When any finite individual develops spiritual qualities and shows large insight and charity, he sits in judgment on the world, and starts a spiritual and 'social' upheaval, and we may say that God is born for the protection of the good, the destruction of the evil, and establishment of the kingdom of righteousness.

Subject and object are the poles of one Reality. They are not unrelated. The principle of objectivity, *moola prakriti*, the unmanifested (*avyakta*) potential of all existence is of the very nature of the creative Logos, *Isvara*. The eternal 'I' confronts the pseudo-eternal 'not I'. The 'not I', *prakriti*, is a reflection of the Self, it is subordinate to the self. The principle of non-being is dependent on being—non-being is a necessary moment in reality for unfolding of the Supreme. The world of time is what it is, because of the tension. The world of time and change is ever striving to reach perfection. Non-being, which is responsible for the imperfections, is a necessary element in the world, for it is the material in which the ideas of God are actualized. The divine forms (*purusha*) and matter (*prakriti*) belong to one spiritual whole.

We cannot account for the fact of the world, but we can only construe its nature, which is a strife between being and non-being in the process of becoming. Pure being is above the world, and pure being is below the lowest existent. If we go lower still we have nothing, it is absolute nonentity. In the world of true becoming, *samsara*, we have conflict between the two principles of being and non-being.

Maya which does not produce *avidya* is said be *sattviki maya*; when it is polluted, it breeds ignorance or *avidya*. The world as effect is said to be less than God, the cause. This relative unreality of the world is confirmed by the self-contradictory nature of the process of becoming.

Maya itself can be, and has been, used in different senses; 1) the Supreme Reality is unaffected by the events in the world; 2) the power of the Supreme to produce mutable nature in which sense *Isvara* and *Maya* are mutually dependent and beginningless; 3) since the Universe is produced by two elements, *prakriti* and *purusha*, of His being, it can be said to be higher and lower (matter and consciousness) nature of God; 4) gradually *maya* comes to mean lower *prakriti—purusha* is the seed which the Lord casts into the womb of *prakriti* for generation of the Universe; 5) as the manifested world hides the real from the vision

of mortals, it is said to be delusive in character. The world is not an illusion, 6) the world being only an effect of God, the world as effect is no less real than the cause. This *relative unreality* of the world is confirmed by the self-contradictory nature of the process of becoming. There is a struggle of opposites in the world of experience, and the real is above all opposites.

On Reality

Reality is, in its own nature, infinite, absolute, untrammeled, inalienably possessed of its own unity and bliss. In the cosmic process, dualities and oppositions which obscure the infinite undivided unreality arise. Five stages are mentioned in the *Taittiriya Upanishad*: matter (*anna*); life (*prana*), mind (*manas*), intelligence (*vijnana*) and bliss (*ananda*). Man is at the fourth stage of *vijnana*. He is not master of his acts. But he is aware of the universal reality which is operating in the whole scheme; he seems to know matter, life and mind. He has mastered, to a large extent, the material word, the vital existence, and even the obscure workings of mentality, but has not yet become the completely illumined consciousness.

Even as matter is succeeded by life, life by mind, and mind by intelligence, even so, the intelligent man will grow into a higher and divine life. Progressive self-enlargement has been the impulse of nature. God's purpose for the world, or the cosmic destiny of man, is the realisation of the immortal aspiration through his mortal frame, the achievement of the Divine life in and through his physical frame and intellectual consciousness. This Divine, dwelling in the innermost being of man, cannot be extinguished. It is the inner light, the concealed witness which endures and is imperishable from birth to birth, untouched by death, decay or corruption. It is the principle of *Jiva*—the Self.

The psychic person changes and grows from life to life; when the ego is completely harmonized with the divine, it ascends into spiritual existence, which is its destiny; until it happens, it travels between birth and death.

Our intellectual nature produces self-consciousness; it leads to the emergence of the human individual from its original solidarity with nature. The security which he derives from instinctive adherence to the group is lost, and has to be regained at a higher level without the elimination of his individuality. By the integration of his self, his unity with the world has to be achieved in a spontaneity of love and unselfish work. Inward security can be bought by submission to the social standard, though the individual does not conceive of himself except through the social medium.

Most of us, by finding our specific place in the world, give a meaning to our life and gain a feeling of security, a sense of belonging. But by submitting completely to social authority, one cannot overcome one's feeling of helplessness and anxiety (fear). Submission to society is not the human way of overcoming loneliness and anxiety. What can help is the inward rule of free devotion to truth, not the external authority's discipline. The Lord is not so compulsive as the totalitarian demands of society. He woos our consent, never compels. No life repeats another, yet a single pattern runs through them all. The essence of ego, the distinguishing characteristic of human personality, is a certain creative unity, an inner purposiveness, a plan which has gradually shaped itself into an organic unity. Any form which the individual assumes is bound to be superseded, for he always tries to transcend himself. The *jivas* are movements in the being of God, individualised, enabling realisation through the proper functioning of *buddhi* or *vijnana*.

The problem facing man then is the integration of his personality; integral life is created by the spirit. We need not crush or destroy nature; we can spiritualise nature because there is a vital unity of soul and body in man. The real dualism is between spirit and nature, between freedom and necessity. Integration ensures victory of spirit over nature, of freedom over necessity. The problem of 'freedom vs. determinism' has meaning only with reference to human individuals. If man is but a simple creature of instinct, if his desires and decisions are only

the results of the forces of heredity and environment, then moral judgements are irrelevant. After teaching Arjuna the whole philosophy of life, Krishna asks Arjuna to do what he chooses. The *Gita* requires man to choose the good and realise it by conscious effort. But there are many impediments to this freedom of choice.

Man is a complex multidimensional being. He is free when he acts from the highest level and uses the other elements for the realisation of his purpose. But when he is on the level of objective nature, when he does not recognise his distinction from not-self, he becomes a slave to the mechanism of nature. The ego should not persist in retaining its obscure and limited consciousness, which is a distortion of its true nature. When we subdue the senses and keep them under control, the flame of the spirit burns bright and clear 'like a lamp in a windless place.' Shifting tides of experience are controlled by *buddhi*, in which is reflected the light of consciousness. We then cease to belong to that which is moved about; we would then no more be helpless tools of nature.

Man, the subject, should gain mastery over man, the object. Object indicates determinism from without, subject means freedom, indetermination. The ego, in its self-confinement, in its automatism, psychical and social, is a distortion of the true subject. The law of *karma* can be overcome by the affirmation of the freedom of the spirit. Liberation is a return to inward being, to subjectivity; bondage is enslavement to the object world, to necessity, to dependence. Man's struggles, his sense of frustration and self-accusation are not to be dismissed as the errors of mortal mind or mere phases of a dialectic process. This would be to deny the moral urgency of life. *Karma* is a condition, not a destiny. Even when we act under the influence of *satva* nature we are not entirely free; *satva* binds us as much as *rajas* and *tamas*—only our desires for truth and virtue are then nobler. The sense of ego is still operative. Hence, the need to become *trigunaatita*.

Only a poet of the calibre of *Kalidasa* could boldly proclaim that there was nothing to which he could compare the marriage of sense and sound; he could only compare the marriage of *Parvati* and *Parameswara* to the marriage of sense and sound. Sir Sarvapalli Radhakrishnan had an unrivalled gift of matching the poetry of Indian thought with the music of his words. To mention this is not to ignore so much more that he did to synthesise Indian thought—this gift, among so many others, perhaps stands supreme.

12

Sri Aurobindo on Human Unity

The imperfection of man is not the last word of Nature, but his perfection too is not the last peak of the Spirit. —Sri Aurobindo

THE IDEA OF Human Unity and the problems connected thereto have been troubling mankind as early as the Holy Roman Empire ('appealing only to the idea of Roman Unity') till modern times, and will continue as long as human beings last.

It is Sri Aurobindo's regret that religion ought to have led the way for human unity, but owing to its greater dependence on its external parts and its infrarational rather than its spiritual impulses, has been as much, or even more, a saver of discord, rather than a teacher of unity. Religion is beginning to realise, a little dimly and ineffectively as yet, that spirituality is after all its own chief business and true aim, and that it is also the common brand of all religions. The 'idea of humanity' has been obliged, in an intellectual age, to mask its true character by religion, not a thing of the soul and the spirit. According to Sri Aurobindo, it is the awakening of the soul in man, and the attempt to get him to live from his soul and not from his ego, which is the inner meaning of religion, and it is to that which the religion of humanity also must arrive, before it can fulfil itself in the life of the man. The religion visualized by Sri Aurobindo contains the seeds of 'growing force,' which tends in the direction of achieving human unity, a common brother-

hood under the Divine (*Vasudhaiva Kutumbakam*) exerting a wholesome influence to 'force Humanity to respect the principle of freedom,' which 'alone can make for the sense of human oneness.' This indeed is the indispensable postulate of the idea of the human race. What is underscored here is the human individual, in the setting of his natural human grouping. This idea is both 'powerful in itself and in its effects,' but has not proved powerful enough yet. The future life of the race, indeed its very existence, rests on the indispensable and inevitable human image of the individual in his natural human grouping. The truth of the matter is expressed so clearly by Sri Aurobindo: 'Until man in his heart is ready, a profound change of the world conditions cannot come; or it can be brought about by force or else force of circumstances, and that leaves all the real work to be done.'

It is the felt necessity of having to concede too much to the egoistic side of human nature that has compelled us to live in a state of perpetual conflict and fear arising from conflict; it has made utter nonsense of human nature. Our capability—actualised to the extent of having to only rely on reason—has led to our being too ready to resort to mechanical solutions, which in turn become 'too self-binding' a process.

Any emerging new idea, with a mere turn of the logical machine, not only revolts against but breaks up the existing machinery, leaving us with no other option, in the end, than to 'substitute any other mechanical system, any other credo, formula and practice.' On the other hand, what Sri Aurobindo describes as 'Spiritual Oneness' will create 'a psychological oneness', not dependent upon any intellectual or outward uniformity, but compel 'oneness of life, not bound up with its mechanical means of unification, but ready always to enrich its secure unity by a free inner variation and a freely varied outer self-expression'; this seems to be the only practicable and true basis for achieving a higher type of human existence.

There is no doubt that only when such a deep realisation is possible to develop, and develop rapidly, that mankind might

be able to solve 'the problem of unification in a deeper and truer way, from the inner truth to the outer forms.'

Sri Aurobindo is also realistic enough to concede that until such realisation is developed, 'the attempt to bring it about by mechanical means must proceed' and that 'the higher hope of humanity lies in the growing number of men who will realise this truth and seek to develop it in themselves, so that when the mind of man is ready to escape from its mechanical bent, perhaps when it finds that its mechanical solutions are all temporary and disappointing, the truth of the Spirit may step in and lead humanity to the path of its highest possible happiness and perfection.' No wonder our efforts to establish a universal religion, 'a system, a thing of creed and intellectual belief and dogma and outward rite' for the purpose of establishing the unity of mankind, have failed—as indeed they deserved to fail. This new Religion of Humanity, envisioned by Sri Aurobindo, is realistically grounded not merely on 'inner spirit' being one, but even more than any other, the spiritual life insisting 'on freedom and variation in its self-expression and means of development.' It is not as if the concept of a Religion of Humanity, envisioned earlier in the history of the human race, did not yield the realisation that there is a Secret Spirit, a Divine Reality, in which we are all one, 'that humanity is its highest present vehicle on earth, that the human race and the human being are the means by which it will progressively reveal itself here.' The basic truth which the individual has to realise is that only the life of one's fellow men makes one's own life complete. What is most important here is the need for both 'a discipline and a way of salvation in accordance with this religion, a means by which it can be developed by each man within himself, so that it may be developed in the life of the race.'

While summarising his thoughts on the Ideal of Human Unity, Sri Aurobindo felt that to go into all these aspects would be too large a subject to be entered upon. He contented himself, therefore, by merely pointing out that 'in this direction lies the eventual road.'

But he warned that if this is 'only an idea' like the rest, it will go the way of all ideas; if it is at all 'a truth of our being,' then it must be the truth towards which 'all is moving' and 'in it must be found the means of a fundamental, an inner, a complete, a real human unity which would be the one secure base of a unification of human life.' 'Spiritual oneness' should create 'a psychological oneness', 'not dependent upon any intellectual or outward uniformity, not compelling a oneness of life, not bound up with its mechanical means of unification, but ready always to enrich its secure unity by a free inner variation and a freely varied outer self-expression.' This would be the basis for a higher type of human existence. India's constant aim, he explains, has been 'to find a basis of living in the higher spiritual truth and from the inner spirit outwards, to exceed the present way of mind, life and body, to command and to dictate to external nature.' He contrasts this with the 'tendency of the normal Western mind to live from below upward, and from out inward. A strong foundation is taken in the vital and material nature and higher powers are invoked and admitted only to modify and partially to uplift the terrestrial life. The inner existence is formed and governed by the external power.'

It would, indeed, be worthwhile to note what Sri Aurobindo had himself to say in 'A Postscript Chapter,' where he attempted to not only analyse but draw some conclusions regarding the disappearance of the League of Nations, which was brought into existence at the conclusion of World War I and replaced by the United Nations Organisation, established at the conclusion of World War II. He described the former as 'a momentous beginning' which was 'not happy in its conception, well-inspired in its formation or destined to any considerable longevity or a supremely successful career,' but was still 'an event of capital importance.' It meant the 'initiation of a new era in world history.' It is not widely known or appreciated how many international organizations with such lasting global benefits owe their origin to the League. This is what Sri Aurobindo probably meant when he drew attention to the League of Nations not being allowed

'to remain without a sequel' and that 'it had to be taken up again' until a successful solution safeguarded the future of mankind, not only against continued disorder and lethal peril, but against destructive possibilities which could easily prepare the collapse of civilisation and perhaps eventually something that could even be described as the suicide of the human race.

Sri Aurobindo explained in detail the workings of nature. The capital event of the founding of the League of Nations, was, according to Sri Aurobindo, a 'crucial and decisive outcome of the worldwide tendencies which Nature has set in motion for her destined purpose. In spite of the constant shortcomings of human efforts and its stumbling mentality, in spite of adverse possibilities that may baulk or delay for a time the success of this great adventure, it is in this event that lies the determination of what must be. All the catastrophes that have attended this course of events and seem to arise in order to prevent the working out of her intention have not prevented (*and even further catastrophes will not prevent*), the successful emergence and development of an enterprise which has become a necessity for the progress and perhaps the very existence of the race. Two stupendous and world devastating wars have swept over the globe and have been accompanied or followed by revolutions with far reaching consequences which have altered the political map of the earth and the international balance, the once fairly stable equilibrium of five continents, and changed the whole future.'

Sri Aurobindo goes into not only the merits but also the difficulties in the working of both these great efforts of mankind, as part of the effort of nature to accomplish her destined purpose: human unity on earth.

It takes a very long time and colossal human endeavour to enter a phase of new consciousness, the consciousness of truth. This was the consciousness which was announced by Sri Aurobindo, one which the sages of India searched for by scaling the high peaks of the spirit, ultimately to find that 'Heaven is in our midst.' We become 'stronger with each obstacle,' with 'each second' 'really lived.'

13

The Indian *Laya* Edifice

THE INDIAN *TALA* is cyclic; it has to be contrasted with the simpler divisions (or bars) of time in Western music. The bars are played throughout the composition in the latter. An illustration may make this clearer. The clap or the beat may be followed by a wave of the hand (*veechu* in Karnatic music or roughly *khali* in Hindustani music) or silence. This is how the time is divided: there may be a clap, two, three or four counts, and a wave of the hand. These series are continuously grouped in simple form. The movement thus suggested is linear.

The Indian mind, much more adventurous than any we may yet perhaps find in the realm of ideas, was not content with simple divisions of time. A deeper purpose had to be served—to make music serve the grand design of matching its conception of life itself—which is cyclic—endless births, progression and regression.

Yet there is a basic—deeper—simplicity behind our musical conception, which from the point of both melody and rhythm appears so complex. This at once reflects the paradox we find in life itself. But there is a basic unity of life, which outwardly is so vastly complicated in its various manifestations. This is the unity sought in all our pursuits, particularly in the fine arts. Music is without doubt the acme of our fine arts.

Our music being cyclic, our *raga*—a unique contribution to the world of music—also is cyclic. The pitch gives us the

sruti; it is but the smallest perceptible unit of sound. A note or a *swara* must obviously consist of more than one *sruti* or microtones. All the seven *swaras* may be complete in the ascent or descent of the *raga*, as it happens for instance in *melarkarta ragas* of Karnatic music (Venkatamakhi's 72 *melakarta* scheme). Or they may be derivations from them. They are called *janya* or derivative *ragas*. Whatever may be the *raga*, based on such *swaras*, grouping of *swaras* and embellishing them with *Gamakas*, makes a total unity—a picture and gives character to the raga. One can start unfolding it in various ways—from the *graha swara* is one mode. The unfolding or elaboration may be short and crisp or long drawn. Really, however, there seems to be no beginning or end of the *raga*, one can surge forth again and again, almost endlessly. Since the whole *raga* makes for an essential unity, the various parts of it must be such that secure such unity. Merely playing on the *swaras* on the frets of the *veena* or the keys of the harmonium does not serve this purpose; the picture of the *raga* is based on curves, rise and fall, tailing of sound and silence etc. Merely being mechanically limited to the frets and keys of the veena and harmonium respectively will lead to utter fragmentation, and will not help the picture to emerge as a result of fusion. The true significance of the *raga*, which is the highest product of aesthetics, is that all *swaras* which can be artistically and aesthetically blended, belong to it.

The melodic pattern has to be supported by a time scale and time sequence—*kala pramana*. To serve this purpose, the time scale cannot be linear; it has also to be cyclic. How then is the *tala* structured?

The beats in any *tala*, can be strong or faint, it is not merely the varying time intervals between beats (pauses) that can determine rhythm. The whole exercise is to secure rhythm, yet, a unit of time, even as the *sruti* (microtone) in the case of melody the smallest interval in the time scale is the '*khsanam*'. It is conceived in such a fine way that it may not be practicable to keep it in mind; nonetheless it is an indication of the subtlety of the Indian mind. One *akshara* or *matra* (as it is called) is the unit of

time for all practical purposes; it is made up of 16284 *kshanas*. The table is: 8 *kshanas* = 1 *lavam*; 8 *lavams* = 1 *kastham*; 8 *kasthams* = 1 *nimisha* (not our minute); 8 *nimishas* = 1 *kala*; 2 *kalas* = 1 *chathurbhaga*; 2 *chathurbhagas* = 1 *anudruta*. In all practical use, there are only two other concepts in addition to the *anudruta*: they are *druta* (2 *aksharas*) and *laghu* i.e. number of *aksharas* depends on the *Jati*.

These divisions of time may be adhered to in various tempos: *vilambit* or *chowka* (slow), *madhyama* (medium), and *druita* or *druta* (fast) are the three basic tempos. In Karnatic music, the usual pace commences from the slow. The other two are twice as fast, *druta* being the fastest. But in Hindustani music the tempo is not increased at the above measured rate from slow onwards; the same strictness is not there.

We have now noticed the three *angas* or parts of the *tala*, *anudruta*, *druta* and *laghu*. By a combination of these three *angas*, we can get seven varieties of *talas* given as below:

1. *eka tala*	1 *laghu* only
2. *roopaka*	1 *druta* + 1 *laghu*
3. *matya*	1 *laghu* + 1 *druta* + 1 *laghu*
4. *triputa*	1 *laghu* +1 *druta* + 1 *druta*
5. *jhampa*	1 *laghu* + *anudruta* + 1 *druta*
6. *dhruva*	1 *laghu* + 1 *druta* + 1 *laghu* + 1 *laghu*
7. *ata*	1 *laghu* + 1 *laghu* + 1 *druta* + 1 *druta*

The *laghu* can be of five kinds or *jatis*, varying number of *aksharas*: *tisra*, 3 units; *chatursara*, 4 units; *khanda*, 5 units; *misra* 7 units; *sankeerna*, 9 units.

The total number of *talas* thus obtained are 7 x 5 = 35

Out of the 35 *talas*, the following, perhaps, are in common vogue are:

adi tala	(4+2+2) *chatusrajati triputa*
roopaka	(2+2+2)
jhampa	(7+1+2)
chapu	(*misra* 3+4)

or

khanda chapu	(2+3+ taken .....from folk music, not included in the above 35 *talas*.
ata	(5+5+2+2+) this contains 14 beats.

Adi, khanda chapu and *misra chapu talas* of Karnatic music can be compared to *teen, jhap* and *roopak talas* having the same number of matras of Hindustani Music.

One vital difference between the two systems is also worth noticing, and that is the importance given to the *sam* or *samam*.

In both Hindustani and Karnatic music, the first beat of any *tala* cycle is called *samam*. In Karnatic music, many compositions start with the *samam*; but there are innumerable ones which do not start with the *samam* but either after it or even before it. The composition may begin at any unit of time, even at ¼ (*kal*), ½ (*arai*) or ¾ (*mukkal*) of it. This makes the *tala* even more markedly cyclic. The total rhythm pattern is still maintained. Whether the composition of the *pallavi* or *eduppu* (starting place) is precisely at the *samam* or not, is when completely mastery is revealed. Perceptive listeners keenly follow this and there is the same eager anticipation and enjoyment when this starting point is reached without faltering.

As part of this sophistication, there is another feature in the Karnatic system. It is known as the time cycle being reduced (*kuraippu*); it is reduced by ½ to start with and then to ¼. The whole rhythm pattern is still maintained. While in the hands of undoubted masters, this can be handled without loss of melody. In the hands of those who are not so competent or those who lack the requisite aesthetic sense, this effort degenerates into mere gimmicks. This leads to loss of melody by singing or playing the *swaras* as mere staccato notes (which cannot be pleasantly heard for any length of time) or cutting the full range aptitude and richness of *swaras*. If properly handled and within limits, it can be a wonderful summation of the entire concert by the kind of dialogues that are possible between all participants. A great care should be taken to avoid aesthetic loss (chiefly by excessive fragmentation and mutilation of the *swaras*) as to

deprive them of the melodic content and distinctive features in the context of the particular *raga*. One method by which this technique may be possible and with greater success than has been attained so far is to artistically arrange the silent pockets, permitted tailing off of a *swara* (*anuswara*) or even dwelling at the requisite length to bring out its *nyasa* aspects. Musicians must know that one of the chief components of music is silence whenever it is necessary. It is the same whether it is a pause in the *tala* or a pause in the *swara* phraseology. There is music in silence also. They have necessarily to coincide.

The rhythmic patterns, so varied and intricate, are perfected to fine proportions in both the systems by *bols* or *sollukattu* (*kunnakol*), in the north and south respectively. Some of the expressions used in the north are also interesting; kaida—an arrangement of bols (in different ways) with definite indications of *tala* sections. The *Theka* itself is the outline of the *Tala*; it defines the *tala*. With these rigid patterns, it may look as if improvisation is difficult; but in the hands of a master who is creative, the way in which the whole thing is handled is a matter for sheer delight.

In this context, special mention must be made of the development of Hindustani music's concert techniques in a manner markedly different from the Karnatic. Quite early in its development, the responsibility for the *tala* had been squarely laid on the drummer. It was not allowed to rest with the main performer. The drummer gives only the set's *bols* at the beginning and the other combinations will come in only later. In Karnatic music the main artist puts the *tala*. We may do well if the student learns to sing or play a melodic instrument along with required *tala* techniques of a percussion instrument. Take care that the aesthetic aspects are not overlooked; it will further enhance the effect of our music. We may at least lay the foundations for a better future for Karnatic music, a future which will preserve the best that is there in our tradition and at the same time make for the utmost creativity. Creativity, in the final analysis, is possible only within the framework of a discipline.

14

Answers to a Few Questions

Q: *How did God come into your life?*

Justice Rangarajan: I believe God came into my life almost with my becoming conscious of myself and my externals. This seemed the most intense experience of my childhood. But this is not to deny that there have been innumerable occasions subsequently when I have been enjoying 'His' living presence. Looking back over sixty years, I have the feeling that He has been nothing but kind to me. Strangely enough, what seems 'His' first act of kindness was to take away my father (an advocate practising with my maternal grandfather) when I was about two years old, so that I could be brought up by my maternal grandfather, who has been to me, not only the ablest lawyer, but a still greater Sanskrit scholar and Vedantin. He exposed me to *Vedanta* in depth. While my debt to him in the field of law is great, my debt to him in the area of Vedanta has been greater. Having fortunately come under the influence of Sri Aurobindo and the Mother, the practice of *sadhana*, of surrender, has taught me that whatever happens to anyone is 'His' blessing and not a curse.

Q: Could *you please narrate the most unforgettable incident in your life?*

A: There have been quite a few. But I will recount here the one which is appropriate to some of the questions put to me. A certain Judge of the Madras High Court (he is alas, no more) treated me, when I was a District and Sessions Judge in the

State of Tamil Nadu, in a way which gave the impression that he was unduly harsh to me. I knew (or at least felt) that my seeing him when he was in power would not help. After he retired, I passed by his house and was seized by a sudden impulse to see him, in order that I may at least no longer have the feeling of having been tormented by him. I was so happy when he embraced me heartily and said all the nice things he could bring himself to say in that unexpected moment. I thought we had buried the past, an impression which was confirmed by a common friend, who telephoned me to say that he had heard the gentleman praising me. In the circumstances, I was really disappointed when I heard sometime later at Delhi, that the same gentleman was speaking bitterly about me in certain quarters. I inferred that this was due to his having learnt then that I was about to be elevated to the Madras High Court, an event which did not, however, take place. The moral of this to me is that such feelings have no place at all in the judicial family; they seem not merely irrelevant but capable of potential harm to the public interest.

Q: *The saying 'Justice Delayed is Justice Denied' is relevant to our country today. What are your suggestions to erase this impression and to speed up the disposal of cases?*

A: It would take a long time to answer this question, but I shall try to compress it as much as I can. While justice should not be denied by delaying it, it should not be buried by hurrying it. There is no simple remedy: a whole package of remedies for this chronic disease seems necessary.

1. The entire judicial administration, in its various levels, has to be looked upon as one court system. Like the strength of the chain being its weakest link, in this area also, the court system will be only as strong as its weakest court. All modern methods of systems management and support for management decision-making are called for.

2. The recruitment of judges at all levels has to be of the best and most appropriate. Every person chosen for performing

the difficult task of judging must be able to deliver the goods efficiently and speedily. We have come across the phenomena even in the higher rungs of the judicial ladder, of more judges leading to less disposals. There should be no dilution of the quality of justice.

3. Our judicial system is called the 'adversary' system, because the adversaries, namely, plaintiff and defendant can be represented in every judicial proceeding. I am afraid that we have not thought enough about how many types of cases are unsuitable for such adjudication. There are millions of small claims (most of which ought to be made, but are not made) which the interposition of a formal hearing, with representation by lawyers itself adding unconscionably to the cost, make it too burdensome and worthless. There is a vast storehouse of global experience in this respect, where there are small claims courts manned by trained staff, which is helpful to litigants, and activist judges who can do without lawyers (see 1975, Vol.28, *Vanderbilt Law Review* pp.713–804). If such courts functioned at all times when business is transacted in business areas, it would not be possible to sell shoddy goods; nor would people charge more than reasonable prices. The entire business honesty of the nation would improve. There would be either no court fee at all (in which event, the loser would pay the costs—out of which the courts would be maintained) or a very reduced court fee. These courts could be manned by trained arbitrators as well, a trial being the last thing that would take place. With growing experience, more and more areas, suitable for being taken out of the purview of the adversary system, would be taken away, with beneficial consequences not only to litigants but to lawyers themselves. They would have enough time and opportunity to concentrate on disputes, where the services of lawyer and judge, in this adversary mould, would be necessary and helpful. The way in which we are allowing the load on the existing adversary system to accumulate, would have only the effect of turning 'adversary' into 'adversity'.

4. The working of the arbitration law has been an utter failure. Even in Russel's *Arbitration* (a leading work), the criticism appears that even in the footnote one does not find reference to a successful arbitration. I have been party to a study recently, which highlights the revamping of the arbitration procedure, and recommends a different mode of compulsory arbitration in some areas suitable for such treatment. Such efforts are necessary to supplement as well as supplant the work that is within the purview of courts alone at present.

5. Specialized tribunals, with men commanding the needed expertise and impartiality, would be very helpful. In all modern countries, like the US, UK, etc., the value of claims settled or adjudicated by these tribunals far exceeds that of the courts. It is quite common to find even in the high courts and the supreme courts, cases moving faster before judges who have the needed expertise in the area.

6. Judges at various levels should have opportunities to meet each other fairly frequently, in order to learn from each other about the problems, ways of confronting them and of solving them.

Q: *There is a feeling that many of our laws on the statute books are time-barred and obsolete. What is your comment?*

A: What is probably meant is that there are several outmoded laws, with the additional implication that several needed laws are not there. If this is what is meant, it would be correct. We know that there is a huge gap between *law in the books* and *law in action*. This gap is constantly widening. The reason for this mainly is that laws which regulate conduct, in the areas they seek to, have no clear understanding of the social and other objective conditions which operate in any given area. I have been fond of saying that in the fields of law and economics, we have an unfortunate dichotomy, namely, of lawyers not knowing sufficient economics and economists not knowing sufficient law. If economics is roughly the science of the creation of wealth, it overlooks the fact that wealth generates power, and that the

regulation of power is the 'province and function' of law. The law cannot adequately regulate the economic area, unless the economic area is known fully, or at least to the needed extent. It calls, therefore, not for a more multidisciplinary approach (as the much abused expression would have it) but a real commingling of the two disciplines to such an extent that there will be a new and hybrid discipline, in its own right, of both law and economics. Many of our laws are passed without factual study of the area where they are to operate.

Q: Legal aid to the poor is considered to be more ineffective in practice. How do we set it right and make it really useful to poor people?

A: As one committed to legal aid from the commencement of my legal practice (in 1938) and even after I left the bar (1952), I have no doubt that legal aid cannot be rendered in an effective manner unless it is properly institutionalized. Mr. Justice V.R. Krishna Iyer and Mr. Justice P.N. Bhagwati have produced two reports, and the Government is seized of this question.

In the United States, the legal profession takes the view that legal aid is a professional responsibility. The situation is not the same in India. Government help and assistance (chiefly in funding) is needed; but this would not absolve the profession of all responsibility. Both have to work in conjunction.

While every effort should be made to promote access to the formal legal system, we have also to think of various devices by which one can dispense with the lawyer, in cases where the interposition of the lawyer would itself disproportionately inflate the expenditure—more than what the cause could bear. In every other area, the indigent client *should* have legal aid and advice. This would be to ensure that there is no avoidable or needless litigation, but also to help steer an indigent litigant through the course of a litigation. As a gesture from the profession, at least to start with and to get the legal aid movement on its feet, every lawyer should voluntarily undertake to do not less than a specified number of legal aid briefs in a certain period. Since,

ultimately, it will be a case of paid-for legal aid and not free legal aid, this would be in the larger interests of the profession.

Ignorant persons should be made aware of their rights. This requires efforts to communicate information, not now within the power of those who need such information.

The existing tyrannies and shortcomings in the legal system may be exposed in the course of providing a larger amount of legal aid; in this sense, legal aid will itself be a movement for the needed legal reform as well.

Legal aid clinics should become a part of the law school curriculum, as I have seen some of them work very well in the United States. I have myself been associated for some time with such efforts at the Delhi Law School. This will be fraught not only with immense benefit to litigants but also to law students. I had ample occasion to see for myself students exposed to legal aid clinics turning out to be more capable lawyers. Further, the student who gets the needed exposure to problems of poverty becomes a different kind of lawyer for life. The indigent client is not a poor man temporarily without money needed for the litigation; his entire outlook, because of his poverty, is different. He has to be not only helped to assert his rights and privileges, but also to be sustained during the course of it. All these require dedication.

It is not merely legal aid to the indigent that is important, but it becomes important to secure the services of fairly able lawyers for a reasonable fee, for those litigants who are unable to pay very high fees.

What is even more important is to have lawyers who will fight in the public interest. I have been speaking, wherever I have a chance to speak, to the Bench and Bar on the newly emerging concept of 'Public Interest Law'. A good example of this would be legal action in the consumer interest. There are many more areas like class action on behalf of consumers, and public interest litigation generally. It is time that the legal profession of our country quickly gets exposed to these realistic

possibilities. The stature of lawyers in society may then become much higher.

Q: *Parents, teachers and politicians are responsible for today's frustrated youth. How does one overcome this problem?*

A: I have been a parent and a teacher—I taught law voluntarily in the Madras Law College for some years and I have been thrown with law students even in Delhi, even helping some of them to do their Ph.D. I have not been, and have no intention of being, a politician. As a parent of two sons who have, by all standards, done exceedingly well, I am still left with the feeling that I have not done what I should have done for them as a parent. There are so many things which are a part of our precious culture which I have not been able to pass on to them in the same measure as I inherited them from my grandfather. Even my sons are somewhat surprised when I admit my failure, for they seem to think, in their generosity towards me, that they have had the good fortune of having the parent they would have wished for. I tell them—really—that I have not been to them, what my grandfather was to me. Though I lost my father early, I am one of those who has had the inestimable good fortune of imbibing about the best there has been in our culture *because* of this parent-child facility.

I have also had the best from my teachers—I could not have asked for any better. When I was teaching law voluntarily, I was conscious of my inadequacies as a teacher. It should be the effort of the teacher to bring his student to at least his own level very soon, thus ensuring a further lease of life for the student to be able to excel or surpass him. On the contrary, a substandard teacher not even being able to take the students upto his own level (whatever it is) only leaves the student frustrated. The parent or the teacher should be able to command regard from the younger person; if he does not do so by his own example (in such intimacy there is no scope or room for mere pretension) then there is nothing but resulting frustration.

The politicians are a class apart. Since I refused to be a politician, very early in my professional career, I have no right to speak about them.

Q: *What are the five most important lessons life has taught you?*

A: 1. A very insightful remark uttered to me by a Jivan Mukta when I was a child of eleven, in answer to a question by me, 'What is a *good time*,' has been the guiding principle of my life. He replied in Tamil. His answer, translated into English, means that your thinking will be right if it is a good time and *vice versa*. I have always asked myself since, whether my thinking is right on any matter, remembering those wise words.

2. When success works, do not disturb it.

3. Do not at any time think that the truth lies only along the lines you think. Justice Homes said he would not regard any mind as civilised unless it was prepared to reconsider at any time what is regarded even as fundamental. This view of life would ensure a lot more tolerance.

4. Do not regret anything that happens to you. God is *always* merciful. I recall the words of Bhattar, who died so young, like Sankara. Freely translated into English it is: Whatever happens to you is by His Grace alone, meaning thereby, you will find the truth of this only later. If you do not, however, have the strength of mind to take any adverse event, when it happens, then console yourself thinking that it is a result of past *karma*; but remember, the truth is that everything happening to you is the result of His Grace.

5. Even if you cannot do good to another, do not do harm. I was greatly impressed by the verse of Bharthrihari, which my grandfather taught me in my childhood. He described as the noblest (*uttama*) those who will only do good to others, even if by doing so they themselves will be harmed; those who would not mind doing harm to others, if by doing so they would be benefited, are bad or *adharma*; he has no words, however, to describe a person who would do harm to another, regardless of whether by doing so he would profit or not.

Q: *What is your message to our journal, 'Wisdom'?*

A: Since democracy is a way of life, there is an intimate nexus with human values. I find from some of the previous issues of *Wisdom* I have read, that the main objective seems to be to foster and promote human values. The service done by *Wisdom* to this cause deserves the support of everyone who is anxious to build up a just and better society.

15

Search

[During the 2001-02 winter vacations, I visited Parali village (near Tiruchy) where Justice S. Rangarajan had spent his last days. Mrs. Rangarajan (Ammaji) showed me a poem that he had written at the age of 80 in the quietness of village life, surrounded by the mystic ambience of coconut trees. It is the only poem he wrote in his life-time, probably at the insistence of his cousin 'Cheenu'—Dr. Krishna Srinivas, Founder President and Editor-in-Chief of Poet, *an international monthly journal published by the World Poetry Society.*—Sanjay Parikh]

For me the Search only
That is what makes life rich.
Each clue that ruthless search yields
Makes life richer only.

Like bolts from the blue, clues may hit you
Or cross your path silently like a cat.
It matters little
Life becomes richer only.

That is the mystery of life
Without it life is duller, poorer.
Demystifying the mystique is no curse
'Tis too great a blessing for that.

Do you first know who you are?
For sure, you do not.
Why then swing from skepticism
To faith … vice-versa too?

Is it predicament or phenomenon,
When layer after layer is peeled?
What is then left … of that onion
Matter or Spirit?

Are they really one or different?
Were we, then mistaken?
When?
Why?

We ceased to be brutes
When we became self-aware.
Accursed were we
When we became vain too?

When his mother scrubbed his face,
Ignorant it was both love and compassion,
To clean the dirt … he tried.
Unique he became, when he knew of it.

Man is left with clues only
Riddled by paradoxes … torn
'tween misfortune and compassion
Enigmas galore that take lifetimes to solve.

This, for sure, is man's blessing
If clues are obvious, mystery is 'cracked'.
He would miss the best
That only Spirit could do.

Nature helps, not hinders
Not mere change but transformation
Man thus saves himself
From deeper misfortunes.

Nature mercifully wove a complex web
Enmeshing its creatures in cause and effect
Which untrained ego takes as harsh or useful;
Every occurrence has its use.

'Tis the joy of Man the seeker,
Life is creative, so is Spirit
Its higher kindness teaches
Hard lessons out of compassion.

16

For the Record

MRS. BHARTI NAYYAR Vs. UNION OF INDIA & ORS

(Judgement by S. Rangarajan & R.N. Aggarwal, JJ)

Crl. Writ 121 of 1975
Decided on: 15-9-1975 [ILR (1977) II Delhi 23]

S. RANGARAJAN, J.—This petition under Article 226 of the Constitution is by the wife of Shri Kuldip Nayyar (hereafter referred to as the detenu) for quashing the order of detention dated 24.7.1975 passed against him by the third respondent (Shri P. Ghosh, Additional District Magistrate, Delhi) in exercise of the powers conferred upon him under clause (b) of sub-section (2) of section 3 of the Maintenance of Internal Security Act No.26 of 1971 (hereafter referred to as the MISA) read with the Delhi Administration Notification No. F.2/69/75-Home (P.II) dated 3.7.1975 detaining him under clause (a) (ii) of sub-section (1) of section 3 of the MISA. On the same date Shri Ghosh also passed an order of declaration, as required by section 16 (a) (3) of the MISA; the same was inserted by section 5 of the Maintenance of Internal Security (Amendment) Ordinance, 1975 (replaced by an Act later) to the effect that the said detention was necessary for dealing effectively with the Emergency proclaimed by the President under Article 352 (1) of the Constitution on 25.6.1975.

2. It is stated in the petition that the detenu was arrested on the morning of 24-7-1975 from his residence under the orders of the third respondent dated 24-7-1975 (copies of which are Annexures A and B to the petition). In view of the declaration no grounds of detention were served upon the detenu.

3. The petitioner being unaware of the reasons for the detention certain facts alone have been mentioned in the petition; they concern the detenu's background with a view to showing that he is not a person who could be genuinely apprehended to be one who would or was even likely to act in a manner "prejudicial to the maintenance of public order". He has always been a peaceful citizen of India; never been a member of any political party, never participated in any political demonstration and had not even done a single act which could possibly lead any reasonable man to infer that he was likely to act in any manner prejudicial to the maintenance of public order. For this reason it is asserted that the third respondent could not have been so satisfied concerning the detention and was in fact not so satisfied. The act of the third respondent, in ordering the detention of the detenue is, therefore, said to be one falling totally outside the scope of section 3 of the MISA and has been described as mala fide. In terms of what the Supreme Court explained in Ram Manohar Lohia v. State of Bihar (A.I.R. 1966 S.C.740) (1) a distinction has to be made between "the maintenance of public order" (which means prevention of disorder of a grave nature or one which affects the community or the public at large) and what might lead to a "disturbance of law and order".

4. The facts which have been stated concerning the detenu are that he is a leading writer and journalist with a world-wide reputation as "a courageous and unbiased journalist". He had joined the Government of India, Ministry of Information as an Information Officer in 1952. He worked as a Public Relations Officer of the late Shri G.B. Pant, the then Home Minister, from the years 1957 to 1961; he had also worked as a Public Relations Officer for a brief period in 1963 with Pt. Jawaharlal Nehru; he was also attached to the late Shri Lal Bahadur Shastri, the then Home Minister, as a Public Relations Officer from 1961 to 1964. He became the General Manager of the United News of India in 1964, popularly known as U.N.I., which has won acclaim as a respectable and creditable organization of journalism; it is claimed that the detenu made positive contribution to the development of the U.N.I. He was with the "Statesman" till February 1975 and subsequently joined the "Indian Express" as its Editor, where he is still employed. He has been a dedicated journalist with no affiliations with any political party. He has been a member of the Press Council of India since October 1970 to which position he was appointed by the Speaker, Shri Dhillon. The detenu was also a member of the Telephone Advisory Committee, a member of the Senate of the Punjabi University and Adviser to the Department of Journalism of the Bangalore University. He was nominated as Member of Press Accreditation Committee by the Press Information Bureau and was elected as Secretary General, I.N.E.C. for one term. He was appointed by the Government of India to the Interview Board of the Union Public Service

Commission to recruit Junior Administrative Officers. He is a firm believer in secularism; he was the first to suggest that a dialogue should take place between Sheikh Abdullah and the Prime Minister of India if the conditions in Kashmir were to be normalized. He had taken special interest in communal harmony; he has been of the view that it is necessary to remove any misapprehension in the minds of Muslims about their future in this country in order that they may develop a sense of Indian citizenship. His impartiality in this respect could be judged from the young Imam of Jama Masjid, during the recent dispute between the Imam and the Government of India, stating that he was willing to accept the detenu as the only non-Muslim arbitrator among the three persons to be nominated. He has been a Jury of the Durga Ratnam Award Committee. Apart from scores of articles he has written three books: (1) Between the Lines (2) Indian in Critical Years and (3) India After Nehru, which are stated to have been greatly appreciated in India and abroad; these works would show that the detenu was interested only in reporting significant events in an objective manner, not supporting or opposing any political party or leader. He has been the Indian Correspondent of "Times" of London, "Spectator, London" and "Washington Evening Star" since 1967 and has been writing articles for the foreign papers. Even after the declaration of Emergency in June 1975 the detenu is said to have written articles presenting the facts objectively and without bias; an assertion is also made concerning them that by no stretch of imagination it should be inferred from them that they were likely to create public disorder; no objection was in fact taken to the publication of these stories and articles. Despite the absence of pre-censorship to such writing for foreign papers the detenu had always exercised self-restraint. The articles written by the detenu in the Indian Express in his own name were not objected to by the Censors.

5. On the 16th of July 1975 the detenu wrote to the Prime Minister expressing his faith in democracy and drawing her attention to the undesirability of imposing pre-censorship. His letter as well as the reply thereto by the Prime Minister's Information Adviser, dated July 21, 1975, have not only been set out in the petition but copies of the same have also been enclosed as Annexures C and D to the petition. It will be seen, on a perusal of them, that the Press Council is stated to have reprimanded the "*Organiser*" for the irresponsible article written against the Prime Minister, though the announcement of the judgement, by that body, had got unfortunately delayed (since announced); he pointed out to the Prime Minister that leading newspapers had criticized "J.P." (Jayaprakash Narayan) in respect of his call to the Armed Forces. The detenu protested against the imposition of censorship on the ground that if the press were to publish only the handouts and information given by the Government there would be none to pinpoint lapses, deficiencies or mistakes. He also quoted Pt. Jawaharlal Nehru's words

to the All India Newspaper Editors' conference on December 3, 1950: "even if the Government dislikes the liberties taken by the press and considers them dangerous, it is wrong to interfere with the freedom of the press". He ended by saying "the type of censorship which has been imposed today will kill initiative, free inquiry and ultimately free thinking. I am sure you do not want that to happen ..." The reply of the Prime Minister's Information Adviser informed the detenu that the censorship was introduced because certain newspapers had become part and parcel of the opposition front and not because of any personal or governmental hypersensitiveness. When those parties had to be prevented from carrying out their plans to disrupt national life the principal organs of propaganda had also naturally to be restrained from stirring up trouble. Restrictions of the press had already contributed to the situation coming under control. In times of national Emergency it was necessary to abridge personal freedom temporarily. The press as a whole had been remarkably ineffective in implementing abuse of press freedom. Regarding the Press Council and a few newspapers which had been cited by the detenu as instances, the question was posed "would you say their action has had impact?" The Prime Minister thought that not all of the newspapers had taken their decisions with responsibility or even respect for the facts.

6. The inference sought to be drawn in the petition was that the views expressed by the detenu in the aforesaid letter to the Prime Minister had "led" to the impugned order having been passed against him. A further assertion was made that there was nothing wrong in expressing the detenu's views in favour of freedom of expression, and that too in a personal letter to the Prime Minister, and that no inference could possibly be drawn from the said letter that the detenu was likely to act in a manner prejudicial to the maintenance of public order.

7. The petitioner alleged that the third respondent had obviously acted in obedience to the orders received from the higher authorities in making the order of detention. The background of the detenu's peaceful and democratic way of life and the position occupied by him as Editor of one of the leading dailies in the country could not make it possible for the third respondent to act on his own initiative and responsibility in making the order of detention; he was himself not satisfied with the necessity of detaining the detenu but acted on instructions from above. The order, therefore, was clearly *mala fide*, invalid and illegal.

8. It is necessary to notice what the detaining authority had to say in his affidavit dated 11.8.1975 on behalf of the Delhi Administration filed in reply to the notice to show-cause why a *rule nisi* be not issued. It is asserted that the third respondent did not act mala fide but that he acted on the material contained in a report which he had before him regarding the "specific activities" of the detenu. The activities were such as to prejudicially

affect the maintenance of public order and were calculated to undermine the efforts of the Government in dealing effectively with the Emergency. The third respondent only knew that the detenu was the author of the three books mentioned in the petition; in other words, he did not even know about the detenu being a journalist and the other facts concerning him which have been set out in the petition. He was not even aware of the exchange of letters between the Prime Minister and the detenu; he came to know of them for the first time only after receiving a copy of this petition with the annexures. It was specifically denied that the detention was ordered as a result of the communication between the detenu and the Prime Minister. The order of detention and declaration were made bona fide; the third respondent was personally satisfied about the necessity to do so with a view to preventing the detenu from acting in any manner prejudicial to the maintenance of public order and in order to deal effectively with the Emergency. These orders were not made in obedience to anything ordered from any higher authority. It has been made sufficiently clear in the said affidavit that the report regarding the activities of the detenu constituted the information and material, on which the third respondent was satisfied, concerning the necessity for detention; the third respondent considered it was against public interest to disclose such information and material. The assertion was, however, made that such material as he had before him was sufficient to arrive at the requisite satisfaction under section 3. The Lt. Governor (Administrator) had reviewed the declaration made by the third respondent and confirmed the same within fifteen days as required.

9. In the rejoinder dated 18.8.1975, filed to the said reply, by the wife of the detenu, it was mentioned that the averments of the third respondent in his affidavit concerning the contents of the said report themselves showed that the third respondent had applied a standard different from the one provided by section 3 (1) (a) of the MISA. The point made out in the rejoinder is that the distinction between 'maintenance of public order' and 'maintenance of mere law and order' had been ignored resulting in the detaining authority taking into account an irrelevant ground that the likelihood of breach of law and order itself was enough to detain whereas the requirement in law was one relating to the maintenance of public order. A comment was made that the detaining authority had not even cared to acquaint himself with the background of the detenu without which he could not be genuinely satisfied. The order of detention had been made in a casual manner without considering the relevant facts pertaining to his occupation and background even apart from his having taken an irrelevant ground into account. It was pointed out that nothing had been said in the affidavit of the third respondent showing that in any of the articles written by him as a journalist there was anything prejudicial to the maintenance of public order; *per contra,* the

third respondent was not even aware of them. Hence the possibility of the third respondent being satisfied from such sources regarding the necessity for detaining him stands ruled out. It was further pointed out that it was obligatory for the respondents to place such material before this Court to enable the Court to ascertain whether there was any genuine satisfaction on the part of the third respondent on the basis of relevant facts. The comment is that the omission to place before the Court such material shows that the impugned order was *mala fide* and was one made outside the purview of the MISA.

10. After hearing Shri V.M. Tarkunde, learned counsel for the petitioner was well as the learned Solicitor General for the first respondent at some length this petition was admitted and an additional reply if any, was directed to be filed. An affidavit dated 26.8.75 was filed by the Special Secretary (Home), Delhi Administration (Smt. Shailaja Chandra) in opposition to this petition stating that she had personally dealt with the file relating to the detenu at all relevant times and that the Lt. Governor, Delhi after considering the report of the detaining authority and the material on the record reviewed and confirmed the declaration under sub-section (3) of section 16A of the MISA. A report in respect of detention had also been made on 2.8.1975 to the Central Government as required by sub-section (3) of section 3 as modified by sub-section (7) of section 16A of the MISA.

11. Regarding the review and confirmation by the Lt. Governor it was stated in the petitioner's affidavit dated 28.8.1975 that the confirmation by the Lt. Governor cannot and does not cure the invalidity of the order of detention. In fact what is challenged in this petition is the order of detention passed under section 3 of the MISA (Annexure A), but not the declaration under section 16A (5) or the confirmation by the Lt. Governor, by way of review of the declaration.

12. An application dated 25.8.1975 (Cr.Misc. 935 of 1975) under section 482 Cr.P.C. was filed on behalf of respondents 2 and 3 to decide, as a preliminary issue, the question of burden of proof and the question whether the law contemplates the production of materials before the Court. It was asserted in that petition that the fact of the detenu being a journalist and not belonging to any political party did not cast upon the authorities a burden to produce the materials before the Court, having regard to the confidential nature of the activities of such individuals like the detenu and without serious prejudice to the efforts to cope with the existing emergency. In reply to the said petition the petitioner filed an affidavit dated 28.8.1975 contending as follows: Section 582 Cr.P.C. could not be applied to a petition for Habeas Corpus under Article 226 of the Constitution and, if allowed, it would result in the hearing of the petition in two stages and delay the disposal of the petition. The respondents ought to take a definite stand and

could not be permitted to shift their stand to suit their convenience. Petitions for Habeas Corpus have to be disposed of expeditiously. The present application was a device to prevent the Court from ascertaining whether any relevant material was available to the respondents on which the impugned order of detention would have been made. If the respondents failed to show genuine satisfaction about the need to detain the order should be quashed. This is the only issue in the case. Therefore, there could be no question of a preliminary issue having to be decided earlier and any other issue being decided later by the Court. If the respondents had any material on the basis on which the third respondent acted it was for them to produce the said material. They could, if they were so advised, apply for privilege under section 124 Cr.P.C. in which event the Court would be able to decide the claim of privilege after seeing such material; the respondents should have no objection to give the Court inspection of the material.

13. The question of onus and when it shifts cannot, it seems to us, be decided piece-meal or in stages; such a course would at least cause delay in disposal of this case, a delay which ought to be avoided to the extent possible; moreover, the questions of onus and its discharge have to be decided on a full conspectus of all the facts and circumstances.

14. When a *rule nisi* is issued by the Court the State has to make a 'good' return in the language of Lord Maugham in Green v. Secretary of State for Home Affairs (1941 (3) All.E.R. 388 at p.392) (2). Our Supreme Court has pointed out on several occasions that when in an Habeas Corpus petition a *rule nisi* is issued it is incumbent upon the State to satisfy the Court that the liberty of the detenu has been taken away strictly in accordance with law and after due compliance with the Constitutional requirement, under Article 22 (6); Article 22, among some others, having been suspended during the emergency which has been declared by a Presidential Ordinance strict compliance with law alone remains. It would be sufficient to refer to the following four decisions of the Supreme Court, among others, on this aspect:

(1) Dulal Roy v. District Magistrate, Burdwan (A.I.R. 1975 S.C. 1508)(3).

(2) Mohd. Alam vs. The State of West Bengal (A.I.R. 1974 S.C. 917, para 15, page 921) (4).

(3) L.K. Das v. State of West Bengal (A.I.R. 1975 S.C. 753 (5).

(4) S.K. Serajul v. State of West Bengal (A.I.R. 1975 S.C. 1517(6)

15. The importance of the last mentioned case consists in the fact that V.R. Krishna Iyer, J., who spoke for the Court, said that it was the duty of the State to have explained the delay in its return, despite the absence of reference in the petition to such delay or any challenge on that ground. The

obvious principle behind this is that the State has to make a 'good' return when a *rule nisi* is issued in a *Habeas Corpus* petition under Article 226 of the Constitution.

16. It may be noted that the old section 491 Cr. P.C. having been dropped from the new Code, Article 226 of the Constitution alone will now be applicable to such cases. If an order is challenged on the ground that it is not one *under* the relevant statute, the MISA in this case, and sufficient circumstances are placed before the Court in support of such a view, it will be for the State to make a 'good' return setting at rest "substantial and disquieting doubts" [adopting the language of Donovan L.J. in the case of *Soblen* (1962) All E.R. 641 at p.664] (7) which the Court entertains concerning either the validity or the *bona fides* of the order of detention. An "answer" may be "called for" in such circumstances; if that answer is withheld, or if furnished is found unsatisfactory, the order challenged ought not to be upheld; otherwise, there would be virtually no protection against an illegal order which had been "clothed with the garments of legality" simply for the sake of appearances, discovery also having been resisted on the ground of privilege. A similar approach was adopted by Pickford, L.J. and Warrington, L.J. in the King v. Supdt. of Chicwick Police Station Ex parte Sacksteder, [(1918) 1 K.B. 578 at pp. 586–589] (8). Pickford, L.J. said:

> "It seems to me that one has to scrutinize the matter carefully for this reason. This legislation had not in view a case of this kind when it was passed. It had in view simply the deportation from this country of aliens whom the Secretary of State thought it was not right to allow to remain here; it had not in view the purpose of carrying out an agreement between this country and an allied country, by which this country agreed to place subjects of that allied country of military age within its jurisdiction.
>
> I wish to guard myself against being supposed to say there are no circumstances in which the Court can go behind an order for detention valid on the face of it. In this case I do not think there are any grounds for doing so."

Warrington L.J. said :

> "Then can the Court in this case go behind the order, which is a legal order, for arrest? I am far from saying that there may not be cases in which that can be done. If, for example, the order, though on the face of it a valid order, was a mere sham to cover up something which would be illegal or to enable some subsequent act to be done which would itself be illegal. In the first case I am far from saying that the Court could not go behind the apparently valid order and say that it was no order at all. In the second case I am far from saying that the Court might not find means of preventing the subsequent illegal act from being done. But in the present case there is nothing of that sort."

17. It seems rewarding to study Chester v. Bateson (1920 1 K.B. 829)(9) though that was a case arising in a somewhat different context. The Defence of the Realm Regulations (Reg 2A) had provided that "no person shall, without the consent of the Minister of Munitions take ....any proceedings for the purpose of obtaining an order or decree for the recovery of possession of, or for the ejectment of a tenant of, any dwelling house" in which a munition worker is living, and which is situated in an area declared by order of the Minister of Munitions to be a 'special area'. This was held to be not authorized by section 1 sub-s. 1 of the Defence of the Realm Consolidation Act, 1914, and, therefore, invalid. Darling. J. said that an "extreme disability" of this kind, even during the emergency of World War I, can be inflicted *only by direct enactment of the legislature itself.* After referring to some instances where Parliament has deprived certain person of the ordinary right of citizens resort to the Kings Courts for the righting of alleged wrongs, certain observations were made which are of relevance here. Darling J. observed:

> "I allow that in stress of war we may rightly be obliged, as we should be ready, to forego much of our liberty, but I hold that this elemental right of the subjects of the British Crown cannot be thus easily taken from them. Should we hold that the permit of a departmental official is a necessary condition precedent for a subject of the realm who would demand justice at the seat of judgement the people would be in that unhappy condition indicated, but not anticipated, by Montesquieu, in De I'Esprit des Lois ... etc." (pp. 834–35).

Avery J. concurring, stated as follows:

> "In my opinion there is not to be found in the statute anything to authorize or justify a regulation having that result....." (p.836).

18. He quoted from the dissentient opinion of Lord Shaw of Dunfermline in Rex v. Halliday (1971 A.C. 287) (10) to the following effect:

> "In so far as the mandate has been exceeded, there lurk the elements of a transition to arbitrary government, and therein of grave constitutional and public danger." (p.837)

Sankey J, also concurred observing as follows :

> "I should be slow to hold that Parliament ever conferred such a power unless it expressed it in the clearest possible language, and should never hold that it was given indirectly by ambiguous regulations made in pursuance of any Act." (p.838).

19. What has to be the nature of the allegations in an application challenging detention during an emergency has been the subject matter of some discussion in Liversidge v. Anderson [1941 (3) All E.R. 338] (11). There was no challenge regarding the *bona fides* of the Home Secretary who had

made the orders of detention; the Home Secretary had given an assurance that he would personally look into every case of detention made under the Defence of the Realm Act, during World War II; there would be a report to Parliament about it every month. The Home Secretary had expressed satisfaction in that case that the detenu had hostile associations. In the very nature of things public interest would not permit such grounds being disclosed; the detenu had himself conceded that the order was made in good faith. What was argued was that it was not enough for the Home Secretary to think that there were grounds to detain but that those grounds must exist as a fact; on this point Lord Atkin dissented from the majority and adopted a construction of the relevant Regulation (18 B) different from that adopted by the majority. This dissent was explained in powerful terms by Lord Atkin in *Liversidge* alone, it being unnecessary to repeat it in *Greene*. This dissent has been accepted as representing the correct legal position in later decisions in England and by our Supreme Court.

20. Before noticing those decisions it may be rewarding to notice that Goddard L.J., had himself said in *Greene,* in the Court of Appeal {1941 (3) All E.R. 104, 118–121}, that it was plainly not enough for a detenu to say to the Court that he did not know why he was interned and to deny that he had done anything wrong; such a petition, did not require any answer, because the order of detention, in proper form, itself provided the answer. After referring to the observations of Lord Wrenbury in R v. Halliday Ex parte Zadig (1917 A.C. 260) (12) and some other cases Goddard L.J. observed as follows:

> "I am of opinion that, where, on the return an order or warrant which is valid on the face is produced, it is for the prisoner to prove the facts necessary to controvert it, and, in the present case, *this has not been done."* (emphasis added)

The view of Goddard L.J. had been approved by Lord Maugham in the two companion cases.

21. The above construction of Lord Atkin has been adopted even in England in the case of statutes employing similar expressions. It would be well to refer to yet another opinion of Lord Denning M.R. while interpreting section 14 (1) of the Restrictive Trade Practices Act of 1956 in Registrar of Trading v. W.M. Smith, (1969 (3) All E.R.1065 at p.1070) (13):

> "On this point, I cannot agree with the judge (1968 (3) All E.R. 721) (14). Before an order for examination is made, there must in fact be reasonable cause to believe that a restrictive agreement has been made. Section 14 (1) starts with the words: 'If the Registrar has reasonable cause to believe that any person .... May be party to' a restrictive agreement. That does not make the registrar the judge of the matter. The words are not: '.....if the Registrar thinks he has reasonable cause to believe'. They are: 'If

(he) has reasonable cause', i.e. in fact. I know that a subjective interpretation was given to similar words in Liversidge v. Anderson (1941 (3) All E.R. 338), but it has been shown to be erroneous by Lord Radcliffe in Nakkuda Ali v. M.F. de S. Jayaratne (1951 A.C. 66 at p.77)."

22. Lord Radcliffe had ever earlier, in Nakkuda Ali v. M.F. de S. Jayaratne (1951 A.C. 66 at p.76) (15), preferred the view of Lord Atkin to that of the majority in those two companion cases; the Home Secretary, it was stated, had to honestly suppose that there was reasonable cause; in other words, there should in fact be reasonable cause. Lord Denning M.R. had, in the passage extracted, referred to this. *Liversidge* and *Greene* have been considered in R.V. Brixton Prison Governor, Ex parte Ashok & Ors. (1969 (2) A.E.R. 347) (16) where Lord Parker C.J., despite the appellant being a person who would have to be deported, still quashed the order of deportation because to enable him to be deported, would be bad in law. While Lord Parker C.J., with whom Blain, J. concurred thought Goddard L.J.'s observations were approved by Lord Maugham (1941 (3) All E.R. 394) Ashworth J. in his dissent, thought he was in good company with the applicant's counsel in that case who thought Goddard L.J. was in error. Lord Parker C.J. did, however, consider certain passages in the two companion cases which seemed to negative the view formed by Lord Parker C.J. but he found it necessary to consider those passages in the context in which they appeared. Pointing out that there was no challenge in those cases with regard to the conditions precedent on which jurisdiction depended he observed (with reference to *Green)* that "the only possible challenge could have been an allegation of bad faith on the part of the Secretary of State and this was disclaimed". Once this is understood, every observation made in *Liversidge* and *Greene* would fall into place.

23. It is needless to be detained by further English decisions. *Liversidge* has been the subject of many learned articles by legal scholars. It may be sufficient to cite *"Liversidge v. Anderson* on retrospective" by R.F.V. Hueston (1970(86) Law Quarterly Review pages 33–68) (17).

24. In various contexts our Supreme Court has said that it is not sufficient for the authority exercising statutory powers to merely say that it held a certain opinion or was satisfied, without the grounds or material on the basis of which it held that opinion existing objectively as a fact. Among the decisions of the Supreme Court it may be sufficient on this aspect to cite Barium Chemicals Ltd., v. Company Law Board (A.I.R. 1967 S.C. 295, paras 27 and 64, pages 309 and 325, respectively) (18) and Sk. Serajul vs. State of West Bengal (A.I.R. 1975 S.C. 1517) (6). The decisions, among others, in Dulal Roy (3), Mohd Alam (4) L.K. Das (5) and Serajul (6), holding that a mere assertion by the detaining authority in the return to a *rule nisi* it had material on which he was satisfied is not enough, have been

already referred to.

25. The Supreme Court has also specifically approved the observations of Goddard L.J. Ramaswami, J., speaking for the Supreme Court, in Jaichand Lal Sethia vs. State of West Bengal (A.I.R. 1967 S.C. 483) (19) observed as follows on p.486:

> "Even though the order as drawn up recites that the State Government was satisfied, the accuracy of that recital can be challenged in Court to a limited extent. The accuracy can be challenged in two ways either by proving that the State Government never applied its mind to the matter or that the authorities of the State Government acted mala fide. In a normal case the existence of such a recital in a duly authenticated order will, in the absence of any evidence as to its inaccuracy, be accepted by the Court as establishing that the necessary condition was fulfilled."

26. Challenges on the ground of mala fides and/or the act being not according to law have therefore, to be investigated by courts. Mala fides has to be understood as not merely mala fides in fact but as Lord Haldane explained in the passage which has now become a classic in Shearer v. Shirley (1914 A.C. 808) (20), mala fides in law also. If the law is not properly conceived or there is a reasonable probability of such misconception having led to the order it would be a case of mala fides in law; even non-application of mind, or omission to consider relevant material, as much as having regard to irrelevant material would be cases of mala fide exercise of such power to detain any one. V.R. Krishna Iyer, J., speaking for the Supreme Court in Bhut Nath Mate v. The State of West Bengal (A.I.R. 1974 S.C. 806) (21) quoted with approval the above observations of Lord Haldane, which is to the following effect, as drawing the line "neatly":

> "Between malice in fact and malice in law there is a broad distinction which is not peculiar to any particular system of jurisprudence. A person who inflicts an injury upon another person in contravention of the law is not allowed to say that he did so with an innocent mind; he is taken to know the law, and he must act within the law. He may, therefore, be guilty of malice in law, although, so far as the state of his mind is concerned, he acts ignorantly, and in that sense innocently."

If the petitioner succeeds in making out a *prima facie* case the burden would shift to the respondents to show that the detention was one *under* the MISA. This is of course subject to the further question raised whether, by reason of the concerned legislation and the Ordinances, there is an area of "non-reviewability even at the threshold". The question, in other words, is whether the concept of "non-reviewability as a threshold determination" has application in this case or is one to be rejected?

27. Both the eminent counsel who appeared for the respondents, one before and the other after admission, appeared to be in difficulties, even

concerning their every approach to this case. The Solicitor General suggested at the earlier stage that the impugned order could be challenged only in a rare case, such as for example, when it was contended/shown that it was a case of mistaken identity. When he was asked how, when the grounds of the order were not only not supplied to the detenu but not stated even to the Court and the material before the detaining authority, or even its contents broadly were not made available to the Court, any detenu could bring out that there was a case of even a mistaken identity, he obviously felt some difficulty in being able to bring himself to say that in such a case there could be any effective review by the Court, and, therefore, stated he would take the stand that there could be no review by the Court in the case of any order of detention. The Writ Petition was admitted because a question of this importance was raised. After the Writ Petition was admitted and while Shri P.P. Khambatte was arguing the case for the respondents he contended during the earlier stages of his argument that mala fides (though he confined it to one *in fact* alone) was the only exception to non-reviewability by Court of such orders in view perhaps of there being an abundance of dicta, English and Indian, to this effect; but as the arguments progressed he felt obliged to go back even on that view and suggest that only if an order was fraudulently made *and* the order bore on its face the stamp of such fraud the same could not be reviewed by courts. If this is also something which should be very difficult to show, or would not normally be the case, this argument also may be taken in substance to be that no order of detention, even one not being supported by law or even against it, could be judicially reviewed under Article 226 of the Constitution. This aspect will be discussed a little later.

28. The learned Solicitor General, who appeared for the respondents, before admission, not only stated, with his characteristics fairness, that he might have to go so far as to contend that judicial power of review was completely barred in such cases but also that the kind of public interest, which was referred to in the reply of the detaining authority (para 16) as standing in the way of disclosing such information and material before him was not the kind of privilege he could raise under section 124 of the Evidence Act. Obviously, even such a claim of privilege could not be put forward except by filing a detailed affidavit claiming privilege. This not having been done Shri P.P. Khambatte, Senior Advocate, who appeared for the respondents later, could only urge that in the present case also there is a kind of public interest against disclosure of such material as was referred to by the Supreme Court in State of U.P. v. Raj Narain (A.I.R. 1975 S.C. 865) (22). A.N. Ray, C.J. observed with reference to the Prime Minister's Blue Book containing regulations for security of the Prime Minister that it is a kind of document concerning which the courts should *proprio motu* rule that there was public interest against disclosure. There had been an affidavit from the

concerned Secretary in that case claiming privilege and actual evidence before the Court had been given by the concerned official that the Blue Book was a document relating to the affairs of the State and was not to be disclosed. The Chief Justice had indicated the "well established practice" in our country in this regard (para 42); such a practice has not been followed in the present case. The present material has not been shown to be one of such a description. The said material not having been placed before the Court for its inspection or even the procedure in this respect not being followed the Court is hardly in a position to uphold any claim of privilege under the Evidence Act.

29. Shri P.P. Khambatte, therefore, sought to support the claim of privilege on three other grounds, namely, that he need not disclose the material which the detaining authority had before him because (1) of Article 22 (6) of the Constitution, (2) of section 8 (2) of the MISA (as un-amended) and (3) of section 16 (a) 5 of the MISA (as now amended). It is clear that none of these apply. Article 22 (6) of the Constitution only enables the detaining authority not to disclose facts against public interest in the context of Article 22 (5) requiring such grounds to be disclosed; section 8 (2) of the MISA is a similar provision in the context of section 8 (1) providing for grounds to be disclosed to persons affected by the order. Now that Article 22 has been suspended as a whole the respondents cannot obviously rely on any portion of it; sections 8 to 12 of the MISA also not apply during the Emergency (by reason of section 16(A) (6) (ii) saying that section 8 to 12 of the MISA do not apply to detentions made under the Act; section 8 (2) of that Act cannot be relied upon by the respondents for this purpose. The reference to section 16(A) seems altogether unavailing for it deals with what is to happen while reviewing such an order by the appropriate government or other officer.

30. The following passages from Willis (Constitutional Law, 1936 Ed.) explain the importance of judicial review in the context of personal liberty and equal protection of laws. After referring to Plymouth Coal Co. v. Pennsylvania (1914, 232 U.S. 531) (23) he says that "perhaps the best view on this subject is that due process and equality are not violated by the mere conference of unguided power, but only by its arbitrary exercise by those on whom it is conferred" (p.586) He also says: "For this reason there is need for judicial review to see whether or not power delegated has been exercised arbitrarily." (p.587) This is because, as he explained in a different context, "liberty, contrary to the popular notion, is a creature of the law instead of something which is destroyed by law. In order to create liberty it is necessary to impose restraints upon the lawless acts of many individuals who would destroy more liberty than law could possibly destroy" (p.568). This is the avowed justification of the present state of emergency. It is one this thing to say that the possibility of mistaken action cannot be ruled out but *quite*

another to go so far as to say that even in a case of mistaken or misdirected action taken to detain it is outside the purview of the judicial process, to whatever limited extent it may be available. The obvious consequence of the latter would be to allow law to destroy liberty, whereas its true role is to uphold liberty. As Justice Jackson (dissenting) stated it so tersely but so well: "The choice is not between order and liberty. It is between liberty with order and anarchy without either" (Terminiello v. Chicago. 1949, 3371 U.S.1) (24).

31. The ship of State could run into rough weather. When it does it may have to take note of several political factors which may *not* even be within the reach of the judicial power. Prof. Carl. J. Frederick explained this idea in Constitutional Government and Democracy (Revised First Indian Edition 1966, pp. 595–596):

> "Constitutional dictatorship, on the surface a contradiction in terms, is the final test of constitutionalism. For a Government which cannot meet emergencies is bound to fall sooner or later. There is not object in arguing against such emergency powers on the ground that they endanger the constitutional morale and hence the maintenance of the constitutional order. Of course they do. Any suspension of legal norms, no matter how temporary, raises doubts concerning their validity. But after all, what does an emergency mean if not that the constitutional order is threatened? Imminent invasion and civil war are only the most blatant final stages of such a danger. No one in his right mind can argue that their emergence should not be forestalled.
>
> How are we to get effective, vigorous government action and yet limit the power of governmental bodies so as to forestall the rise of despotic concentration of power? Logically it is a paradox, but practically it has been done. The task requires all the wisdom man can muster. The prize in his greatest achievement: freedom."

The administrative process (executive action) will during such an emergency have its sway but only subject to the limit set by the law. Even in that situation the administrator in whom such vast powers are vested during such dire situations, is not authorized to dispense with *all* the care (and circumspection) he can or is required to take; that is why bona fide actions are protected even as those which are *mala fide*, which expression obviously includes those that are misdirected or open to serious doubt as not having been properly directed according to law, will not be protected.

32. The Constitution of the United States provides (Art.1 section 9, clause 2) that "(T)he privilege of the writ of Habeas Corpus shall not be suspended unless when in case of rebellion or invasion the public safety may require it". The "implication of this language is that the suspension of the privilege of the writ does not deprive the courts of the right to issue it. It

furnishes merely a legal ground for a refusal to obey it" (Ex parte Vallandigham, I Wall 243). The suspension of the writ of Habeas Corpus does not actually operate to authorize *illegal* arrests: those making such arrests would be liable civilly and criminally (Willoughby, Constitutional Law of United States, 1938 Edn. Pages 676 and 677).

33. There has been a further controversy in the United States, into which it is needless to enter about, in whom this power of suspension vests—with Congress or the President? Abraham Lincoln, who has been acclaimed as one of the world's greatest democrats, ironically enough had to exercise this power of suspending Habeas Corpus during the American Civil War. We may perhaps draw comfort, if we can, from the historical example which Prof. J.G. Randall explains so lucidly in his work "Constitutional Problems under Lincoln" (Revised 1951 Edn. Page 521): "(N)o undue advantage was taken of the emergency to force arbitrary rule upon the country or to promote personal ends. A comparison with the European examples shows that Lincoln's Government lacked many of the earmarks of dictatorial rule".

34. There has been no suspension of the writ of Habeas Corpus (Article 226) in India. Personal liberty is sought to be regulated by law.

35. If freedom from arbitrary or illegal arrests and prevention of exploitation of it for personal ends has to be made possible, it can be only by resort to the judicial power in order to keep administrative discretion in this respect "structured, confined and checked", in the insightful language of Prof. K.C. Davis "Discretionary Justice". It has been so aptly said by John P. Roche, "Judicial Self-Restraint". American Political Science Review, Vol.49, p.772 (Sep., 1955) that the judicial power and self-restraint are but "two sides of the same coin"; in fact they mutually support, do not destroy, each other. But if self-abnegation is allowed to masquerade as self-restraint that may also amount to allowing self-restraint to destroy the judicial power. It is this needed and delicate balance that has to be sought by the exercise of judicial power. It is in the light of such ideas, which we regard as basic to the functioning of the rule of law in our democracy, that we have endeavoured to understand the relevant constitutional and legislative provisions made during this emergency.

36. On 27.6.1975 the President had issued a declaration under Article 359 (1) of the Constitution that the right of any person (including a foreigner) to move any court for the enforcement of the rights conferred by Article 14, 21 and 22 of the Constitution and all proceedings pending in any court for the enforcement of the afore-mentioned rights shall remain suspended for the period during which the proclamations of emergency made under clause (1) of Article 352 of the Constitution on the 3rd of December 1971 and on the 25th of June 1975 are both in force. The Maintenance of Internal Security (Amendment) Ordinance (4) of 1975 (hereafter referred

to as the MISA Ordinance), which was proclaimed on 29th June 1975 made certain amendments to the MISA, the relevant portions of which will be discussed presently. The 38th Constitution Amendment of 1975 introduced clause (1A) in Article 359 of the Constitution as follows :

> "(1A) While an order made clause (1) mentioning any of the rights conferred by Part III is in operation, nothing in that Part conferring those rights shall restrict the power of the State as defined in the said Part to make any law or to take any executive action which the State would but for the provision contained in that Part be competent to make or to take, but any law so made shall, to the extent of the incompetency, cease to have effect as soon as the order aforesaid ceases to operate, except as respects things done or omitted to be done before the law so ceases to have effect."

Section 3(1) of the MISA reads :

> "Power to make orders detaining certain persons.—(1) The Central Government or the State Government may, -
>
> (a) if satisfied with respect of any person (including a foreigner) that with a view to preventing him from acting in any manner prejudicial to—
>
> (i) the defence of India, the relations of India with foreign powers, or the security of India, or
>
> (ii) the security of the State or the maintenance of public order, or
>
> (iii) the maintenance of supplies and services essential to the community, or
>
> (b) if satisfied with respect to any foreigner that with a view to regulating his continued presence in India or with a view to making arrangements for his expulsion from India, it is necessary so to do, make an order directing that such person be detained."

37. It is not disputed that the Additional District Magistrate (third respondent) was one who could pass such an order under the MISA. By reason of section 16A which had been brought on the statute book by MISA Ordinance (with effect from 29.6.1975) making an order of detention under the MISA against a person (like the petitioner) after the commencement of the MISA Ordinance (29.6.1975) which reads:—

> "16A (1) Notwithstanding anything contained in this Act or any rules of natural justice, the provisions of this section shall have effect during the period of operation of the Proclamation of Emergency issued under clause (1) of Article 352 of the Constitution on the 3rd day of December 1971, or the Proclamation of Emergency issued under that clause on the 25th day of June 1975, or a period of twelve months from the 25th day of June 1975, whichever period is the shortest.

(2) The case of every person against whom an order of detention was made on or after the 25th day of June 1975 but before the commencement of the Maintenance of Internal Security (Amendment) Ordinance 1975, shall, unless such person is sooner released from detention, be reviewed within fifteen days from such commencement by the appropriate Government for the purpose of determining whether the detention of such person under this Act is necessary for dealing effectively with the emergency in respect of which the Proclamations referred to in sub-section (1) have been issued (hereafter in this section referred to as the emergency) and if, on such review, the appropriate Government is satisfied that it is necessary to detain such person for effectively dealing with the emergency, that Government may make a declaration to that effect and communicate a copy of the declaration to the person concerned.

(3) When making an order of detention under this Act against any person after the commencement of the Maintenance of Internal Security (Amendment) Ordinance 1975, the Central Government or the State Government or, as the case may be, the officer making the order of detention shall consider whether the detention of such person under this Act is necessary for dealing effectively with the emergency and if, on such consideration, the Central Government or, as the case may be, the State Government or the officer is satisfied that it is necessary to detain such person for effectively dealing with the emergency, that Government or officer may make a declaration to that effect and communicate a copy of the declaration to the person concerned:

Provided that where such declaration is made by an officer, it shall be reviewed by the State Government to which such officer is subordinate within fifteen days from the date of making of the declaration and such declaration shall cease to have effect unless it is confirmed by the State Government, after such review, within the said period of fifteen days.

(4) The question whether the detention of any person in respect of whom a declaration has been made under sub-section (2) or sub-section (3) continues to be necessary for effectively dealing with the emergency shall be reconsidered by the appropriate Government within four months from the date of such declaration and thereafter at intervals not exceeding four months, and if, on such reconsideration, it appears to the appropriate Government that the detention of the persons is no longer necessary for effectively dealing with the emergency, that Government may revoke the declaration.

(5) In making any review, consideration of reconsideration under sub-section (2), (3) or (4), the appropriate Government or officer may, if such Government or officer considers it to be against the public interest to do otherwise, act on the basis of the information and materials in its or his

possession without disclosing the facts or giving an opportunity of making a representation to the person concerned.

(6) It shall not be necessary —

(a) to disclose to any person detained under a detention order to which the provisions of sub-section (2) apply, the grounds on which the order has been made during the period within which his case may be reviewed under that sub-section and where, on such review, a declaration has been made in respect of such person under that sub-section, also during the period when such declaration is in force;

(b) to disclose to any person detained under a detention order to which the provisions of sub-section (3) apply, the grounds on which the order has been made during the period the declaration made in respect of such person under that sub-section is in force, and accordingly, such periods shall not be taken into account for the purpose of section 8.

(7) In the case of every person detained under a detention order to which the provisions of sub-section (2) or sub-section (3) apply, and in respect of whom a declaration has been made thereunder, the period during which such declaration is in force shall not be taken into account for the purpose of computing the periods mentioned in section 10 or section 11."

Section 18 of the MISA reads as follows:

"18. Exclusion of common law or natural law rights, if any.—No person (including a foreigner) detained under this Act shall have any right to personal liberty by virtue of natural law or common law, if any."

Shri V.M. Tarkunde submitted that in this case he was not challenging the declaration under section 16A, or the confirmation of the same by the Lt. Governor; he was not challenging the validity of the MISA Amendment Ordinance later Act or the 38th Amendment. However, he ably mounted his entire attack on the impugned order on the ground that despite the onus being on him to show that it was bad an onus which had been rendered even more difficult by the non-supply of grounds—he had discharged the same and that the respondents not having made a 'good return' the order of detention itself has been shown to be bad and the further declaration and confirmation of that review would also fall with it.

38. Shri V.M. Tarkunde explained that he was challenging the order of detention on the ground that it is not a lawful order passed under the MISA and that there is nothing in Article 359 (1) (A) of the Constitution, even as amended, which can permit a detention of the petitioner otherwise than according to law. There is very little difficulty concerning Article 359 (1) (A) because all that it says is that while an order made under Article 359 (1) is in operation nothing in Part III would restrict the power of the State to make

any law or to take executive action which but for the provisions contained in that Part it would be competent for any legislature or executive to make or to take. Article 359 (1), without the recent amendment, would have enabled the legislature or the executive of any State, as defined in Part III, only to suspend enforcement of the rights conferred by Part III vis-à-vis Article 19 (with which alone Article 358 deals). The effect of this new amendment by adding clause 1(A) to Article 359 is that not merely Article 19 but the other rights conferred by Part III could also be suspended. Shah, J. (as he then was), speaking for the Supreme Court, in State of Madhya Pradesh v. Bharat Singh (A.I.R. S.C. 1170) (25) held that in respect of acts done to the prejudice of the respondent after the declaration of emergency (October 20, 1962) under Article 352 of the Constitution no immunity from the process of the Court could be claimed under Article 358 of the Constitution since the order was not supported by any valid legislation. The observations of Mukherjee, C.J. in Ram Jawaya Kapur v. State of Punjab (1955 A.I.R. S.C. 549) (26), which were relied upon as enabling the State to issue executive orders without legislation, were explained as having been made in the context of distribution of powers between the Centre and State, and the order in that case not having operated to the prejudice of any citizen. The same approach was reiterated by Shah, J. in The District Collector of Hyderabad v. M/s. Ibrahim and Co., etc. (A.I.R. 1970 S.C. 1275) (27). The following portion of the head-note makes this point clear:

> "But the executive order immune from attack under Article 358 is only that order which the State was competent, but for the provisions contained in Article 19, to make. Executive action of the State Government which is otherwise invalid is not immune from attack, merely because a proclamation of emergency is in operation when it is taken."

39. The 38th Amendment, inserting Article 359 (1A) into the Constitution, has only this effect, namely, that in addition to rights under Article 19, already provided for as per Article 358, the other rights also enshrined in Part III cannot, during the subsistence of the emergency, invalidate legislative or executive action; but this does not dispense with the need to justify executive action in an emergency by a valid law. The respondents cannot, therefore, derive any assistance in this respect from the 38th Amendment. The legislature must be taken to have been, and indeed appears to have been, aware of this position when in its wisdom section 18 of the MISA provided that natural law rights and common law rights also, in addition to the rights under Part III of the Constitution, which had been dealt with in the aforesaid manner, would be put an end to by reason of orders passed under the MISA.

40. The right to personal liberty is undisputedly a common law right (see Willis, pages 646–648, for a detailed summary of the position in this

respect in England). The common law of England, which had been adopted in this country before the Constitution came into force, continued to have validity, except in so far as it came into conflict with the express provisions in the Constitution vide Director of Rationing and Distribution v. The Corporation of Calcutta & Ors. (A.I.R. 1960 S.C. 1355) (28).

41. A Division Bench of this Court consisting of Prakash Narain and Ansari, JJ. have held in Smt. Manekben v. Union of India (Cr. Writ 1 of 1975), decided on 18th April, 1979 (29) that "the Executive has no absolute power to deprive a person of personal liberty". As we have said, the Executive has to comply with the norms of law providing for detention without trial. Some decisions of the Supreme Court, the Federal Court and other High Courts have been referred to therein; we have chosen to specially mention the above two decisions where this question has been specifically dealt with, in the view they were not noticed in Smt. Manekben. Reference was, however, made therein to the observation of Hidayatullah, J. (as he then was) in Ram Manohar Lohia's case (not Makkan Singh v. State of Punjab, A.I.R. 1964 S.C. 380) (30), as incorrectly noticed that the President (when he issued the Ordinance of 1962) "did not make lawless actions lawful".

42. The question whether Article 359 (1) enlarged the sphere of executive action beyond what had been authorised by the law was emphatically held in the negative in Makkan Singh also. In Emperor v. Shiv Nath Banerji (A.I.R. 1943 F.C. 156) (31) the Federal Court, even before the Constitution, repelled the argument that the Court had no jurisdiction to investigate the validity of a detention order. It was pointed out that the recitals in the detention order placed a difficult burden (which may be said to have now increased by the grounds not being supplied to the detenu) to produce admissible evidence sufficient to establish a *prima facie* case that the recital, is not accurate. In Ram Manohar Lohia's case it was held that despite the Presidential Order, the order of detention, which was held to be bad even *ex facie*, was not one made under the Defence of India Act or Rules. In Anandan Nambiar v. Chief Secretary (A.I.R. 1966 S.C. 657 (32), which was also not noticed in Smt. Manekben, Gajendragadkar, C.J. speaking for the Supreme Court, repelled the contention that a petition under Article 32 of the Constitution challenging an order purporting to be made under the Defence of India Rules, was one not made under the Act/Rules, was not maintainable.

43. The upshot of all these cases is that what is unlawful activity will not become lawful merely because an order of detention is passed in any given case by executive action alone i.e. without legislative support. It must stand the test of lawfulness, of the same having to be passed under some valid provision or law and in strict compliance with it, in cases where such challenge seems permissible. The passing of such an order is a case of conditional exercise of power; if it is shown that the conditions subject to which

alone such a power could be exercised are not fulfilled then it will not be a case of an order passed under any valid law and will be struck down. No further reliance can be placed, in this respect, on Article 359 (1) (A) as inserted by the 38th Constitutional Amendment. The contention of Mr. Khambatte that the principle laid down in Smt. Manekben, which is binding on us, does not apply by reason of section 18 of the MISA and the 30th Amendment, does not seem to have force. There can thus be no finality in respect of these orders of detention. They are not outside the pale of review under Article 226 of the Constitution altogether.

44. It is needless to refer to the innumerable authorities, both Indian and English, which have held uniformly that the mere expression in a statute that an order made under the statute is final will not prevent review by the ordinary courts of the land when the challenge made is that the impugned order is not made under the Act concerned and even in cases where a suit is barred there could be a challenge in respect of jurisdiction and legality, under Article 226. Denning L.J. had discussed the question from the angle of certiorari in Regina v. Medical Appeal Tribunal Ex parte Gilmore (1957 I.Q.B. 575) (33) and has also sketched the development of law from the days of Coke (pp.583 to 586); he has also referred, among other decisions, to Rex v. Plowright (1686 3 Mod 94, 95) (34) where stress was laid on some statutes also laying down that "no certiorari would lie". He has also noticed that modern statues never take away, in express words, the right to certiorari without substituting an analogous remedy (p.586). He quoted Lord Denman, C.J. (in Reg. v. Cheltenam Commissioner (1841 1 Q.B. 467((35): "The statute (which gave finality to certain orders of a tribunal) does not affect our right and duty to see justice executed."

45. In a bid to show that there was a complete bar of the exercise of judicial power (under Article 226) with reference to orders passed under the MISA, irrespective of whether they fall inside or outside the Act, Shri Khambatte relied upon certain observations of Viscount Simonds in Smith v. East Elloe Rural District Council and others (1956 (1) All.E.R. 854) (36). The validity of a compulsory purchase order was in question on the ground that it was made in "bad faith" and "wrongfully". Viscount Simonds, speaking for the majority, did not countenance the argument that an order in bad faith was outside the Act because the concerned provision (para 16 of Schedule 1 of the Acquisition of Land (Authorisation Procedure) Act, 1946) which gave finality to such orders did not postulate only lawful orders or those made in good faith. Lords Reid and Somerville of Harrow dissented. In the subsequent case of Anisminic, Ltd. v. The Foreign Compensation Commission, (1969 (1) All. E.R. 208) (37) the majority did not agree with this view. Lord Reid, who was in a minority in Smith, was in a majority in Anisminic. This decision has been acclaimed by several legal scholars as an important

landmark. It has also met with the approval of our Supreme Court in several decisions. Mathew J., speaking for the Supreme Court, applied the extended meaning of jurisdiction, adopted in Anisminic, to include even grave errors of law, in addition to only errors pertaining to limitation and res judicata (as previously recognised) in cases coming under section 115 of the Code of Civil Procedure (M.L. Sethi v. R.P. Kapur, A.I.R. 1972 S.C. 2379) (38). Smith was not followed by our Supreme Court even before Anisminic; the Supreme Court said that it was not prepared to go as far as the holding in Smith. Mudholkar, J., spoke for the majority in the above manner in Somawanti v. State of Punjab (A.I.R. 1963 S.C. 151 at p.166) (39). On the merits the petitions, which were filed under Article 32 were dismissed. Subba Rao, J. (as he then was) dissented and wanted those petitions to be allowed on the merits. In the result Smith was not followed. No argument can, therefore, proceed before us contrary to what was held in Anisminic. It seems to us that the inspiration for Shri Khambatte's argument, that even mala fide orders of detention cannot be challenged, except when there the order itself *prima facie* shows fraud even contrary to his own earlier submissions before us, probably came from Smith. As soon as Smith was cited it was pointed out by us to Shri Khambatte that it had been disapproved by Anisminic (Lord Reid having referred to Smith as a 'very unsatisfactory case'). At that stage Shri Khambatte preferred to address his further arguments to us based on Smith, if necessary, on the following day. When Shri Khambatte, later on, still referred to Smith the other side drew our attention to Somavanti on this aspect. In this light Shri Khambatte could not proceed further with this contention before us.

46. It seems futile, therefore, to contend that any order of detention under the MISA is beyond challenge under Article 226; it will be so only if the same is one passed under it.

47. The next question for consideration is whether the petitioner has made out that the impugned order is not one under the Act. The initial burden has always been on the detenu, or on his behalf, to show that it is liable to be quashed. The above discussion of the relevant cases shows that this burden is not discharged by his merely saying that he does not know why he was detained. This burden, which has been always regarded as at least somewhat difficult to discharge, seems to have only become even more difficult by reason of the non-supply of grounds once the declaration under section 16A of the MISA is made.

48. It is necessary at this stage to deal with the argument of Shri Khambatte that the considerations which are open to the detaining authority under section 16A would also be open to him while making up his mind to detain a person under section 3 of the MISA. On a careful consideration of this argument it seems to be without force, as we shall explain later.

49. In this particular case the ground of detention is the maintenance of public order. The distinction between an act prejudicial to the "maintenance of public order" and "law and order" has been explained at length in Lohia's case. Hidayatullah, J. explained this idea in terms of concentric circles—law and order being the outer circle and the maintenance of public order coming within the inner circle. The public order would not be breached unless there is public disorder on a large scale (see paras 51 and 52 of A.I.R. 1966 S.C. 740 (1) Ram Manohar Lohia v. State of Bihar). The same distinction has been explained in the following cases also:

A.I.R. 1970 S.C. 1228—Arun Ghosh v. State of West Bengal, (40)

A.I.R. 1973 S.C. 295—Manu Bhusan Roy Prodhan v. State of West Bengal (41).

A.I.R. 1975 S.C. 609—Ram Ranjan Chatterjee v. State of West Bengal (42)

50. The detaining authority has, therefore, to come to a conclusion that on the basis of the material he has, it is at least 'probable', that the detenu would act contrary to the maintenance of public order. The facts, which have not been controverted in this case and which make it somewhat unique, here are (1) that he has never been a member of any political party, (2) that he never participated in any political demonstration, (3) that he has not even committed any ordinary breach of the law, (4) that he has been holding position of great responsibility, (5) that he is a professional Journalist with an international reputation for the objective manner of his reporting, and (6) that the censors had not objected to his publications, even after the emergency, in foreign papers.

51. We have also to remember, in this context, that the detaining authority did not even know that he was a journalist, except the fact of his being an author of three books, or other facts concerning the background of the detenu; besides the above knowledge the only further material the detaining authority had before him was a report mentioning "specific acts". We have been wholly unable to understand how an assessment was made, or how it can be made, genuinely that it was probably that the detenu would act prejudicially to the maintenance of public order in the sense above explained. We have not even been told what "the specific acts" referred to were in order to be satisfied there was such satisfaction by the detaining authority as required by the law.

52. It seems probable that the detaining authority made a mistake about the scope of his powers under the MISA. This may even be excusable to start with, but it seemed to us that at least after so much prolonged debate before us if any mistake had been made to the detriment of the detenu by not taking into consideration relevant material or taking into account material

which was insufficient in law or by the detaining authority misdirecting himself there should be a candid admission about it. The emergency would be more effectively dealt with in this way than by what has been attempted in this case.

53. Shri V.M. Tarkunde also urged that what has been prevented by the "censorship", which has been imposed under Rule 48 of the Defence of India Rules, by order dated 26.6.1975 by the Government of India does not appear to debar any one from speaking or communicating in writing to another about the censorship itself and that the mere fact that the detenu wrote to the Prime Minister expressing his own views about imposing censorship could not form the basis, in law, of any detention order. But as a fact in this case the detaining authority has said that he was not even aware of the detenu having written to the Prime Minister. This argument need not, therefore, detain us.

54. We were hoping, at least after we expressed ourselves clearly against the position contended for that there was a complete bar against judicial scrutiny in all cases and were commencing, during the hearing, on the absence of any material before us, that either the material, if it was relevant and sufficient, would be forthcoming or that the detenu would be released. Neither of these happened.

55. Instead, Shri Khambatte contended that the considerations open under section 16A would enlarge the scope of section 3 of the MISA. We are wholly unable to agree. The grounds of detention have been dealt with under section 3 and they are the *only* permissible grounds for detaining a person under the MISA. All that section 16A authorizes is that "when making the order" the detaining authority is satisfied that in order to deal effectively with the emergency he should make a declaration thereunder he may do so. The two legal consequences of such a declaration are: (1) no grounds need be furnished to the detenu; (2) he would not get the benefit of his case being considered by any advisory board. The first would make the onus on the detenu more difficult; the second deprives him of an opportunity of review by an advisory board. Apart from these two legal consequences, following from the declaration, we fail to see how the declaration would help enlarge the grounds available, for detention under section 3 of the MISA. While we see no force at all in this submission, it only makes us even more apprehensive, whether in this case the detaining authority had probably misdirected himself in this way also.

56. We have endeavoured to indicate the availability of judicial review and also to indicate at least, broadly, at the same time, the limits subject to which it would be available at some length on account of this question being so important. What we have been at pains to explain is that the rule of law will not permit arbitrary executive action.

57. In the result the impugned order (copy of which is Annexure A to the petition) is quashed, and the detenu (Shri Kuldip Nayyar) is directed to be set at liberty forthwith. The petition is accepted accordingly.

Petition accepted.

58. P.S.: In this case the judgement was reserved at about 3 P.M on 10th September, 1975, the hearing of the case having commenced on 1st September.

59. Shri V.M. Tarkunde, learned counsel for the petitioner, prayed at the conclusion of the hearing that in the event of our agreeing with his submissions we may orally direct the revocation and release of the petitioner and record our reasons for it later. Having regard to the way in which this petition was resisted right till the last moment of the hearing it seemed to us that the respondents might wish to take the matter further; we did not wish, therefore, to place them under any handicap in this regard by our judgement in writing with full reasons not being made available to them immediately. We only reserved judgement but we observed that we would not really be taking much time for judgement.

60. After our judgement had been prepared we had directed on 12th September, 1975 that the case be listed for judgement on the 15th September. At that stage, on the 12th September itself, when we were about to rise for lunch (at about 1 P.M) Shri A.B. Saharya, junior counsel for the respondents, mentioned to us, that the detenu in this case had been released and that the order of detention had been revoked, according to the instructions he had received that morning. We could only tell him then, since we wished to consider what we should do further, that the judgement, which had been prepared, had been directed to be listed for pronouncement on the 15th September, 1975. We also added that the action reportedly taken by the respondents was in 'tune' with the judgement proposed to be delivered by us.

61. A written application (Cr. Misc.1007/75) since filed by Shri Saharya, enclosing a copy of the revocation order dated 11/12th September 1975 and praying that the same may be placed on record and suitable orders passed thereon, has come up for admission today.

62. The action taken by the respondents after judgement was reserved in this case does no doubt accord with our view of the case; the respondents were free to take the same kind of action even in the eventuality of our dismissing this petition. This is what happened to *Greene* after the House of Lords declined to release him (See the article of Hueston, page 15, referred to in our judgement: 1970 (86) Law Quarterly Review, p.33). Putting it at the minimum level and without even making any endeavour to raise it to the level of any breach of propriety it seems to us that at least after judge-

ment was reserved by us courtesy to Court demanded that we were apprised about the intended action *before* it was actually taken.

63. In being persuaded to pronounce the judgement prepared by us even before we knew about this kind of action by the respondents we are pressed by the consideration that in the public law area, which is what any matter pertaining to the issue of a writ of Habeas Corpus under Article 226 of the Constitution is, we are unable to visualize any compromise as such between the parties (it is not so here in fact) even without reference to Court especially after the issue of a *rule nisi,* which requires to be discharged by the Court. In this view, the judgement which was prepared by us, as explained above, has been pronounced and is signed by us, subject, however, to our recording the fact that an order quashing and giving direction to release the detenu has become unnecessary in these circumstances. The *rule nisi* is discharged.

Bibliography

1. 'Government, Law and Lawyers': Paper contributed to a seminar organized by the Provincial (Madras) Bar Federation in 1960: (1959–1960) *LAWYER,* Vol.5, page 106.
2. 'The Great Challenge': (1962) *THE LAW WEEKLY*, Vol.74, (Madras) Journal Section, p.83- Contributed on the occasion of the Centenary Celebration of the Madras High Court.
3. 'Judicial Creativity and the Ombudsman': Proceedings of the Symposium of the Provincial (Madras) Bar Federation, edited and published by T.V. Viswanatha Iyer (1963).
4. 'Jurisprudence Curriculum and the Natural Law': (1963) *Jaipur Law Journal,* Vol.3, p.143.
5. 'Post Graduate Diploma Specialisation': (1964) *Jaipur Law Journal*, Vol.4, p.109.
6. 'Comparative Study of Personal Laws': (1965) *Jaipur Law Journal*, Vol.5, p.36.
7. 'Hindu Brief': (1964), *The Indian Year Book of International Affairs*, Vol. XIII Part I, p.174.
8. 'Research in Legal Education': (1965) *Third Year Book of Education*: Ministry of Education, Government of India, p.215.
9. 'Legal Education': (1974) *Year Book of Legal Studies*, Madras.
10. 'Some Perspectives in Clinical Legal Education': (1973) *LAWYER*, p.145.
11. 'Corporate Growth': (1967) Published by the Indian Law Institute Delhi in the proceedings of the Seminar held at Ooty on Property Relations in Independent India, Constitutional and Legal Implications.
12. 'Freedom of Expression and Educational Planning': (1967) Published by the Indian Law Institute in the Proceedings of the Seminar held at Delhi in January 1966 on Educational Planning in India: Legal and Constitutional Implications.
13. 'The Anglo-Saxon Experiment Concerning the Rule against Reception of Hearsay Evidence and What It May Mean to Us.' Special issue of the *Journal of the Indian Law Institute* (1972) to mark the centenary of the Indian Contract Act and Evidence Act, p.27.
14. 'Equal Justice Among Unequals': (1973) Journal of the Bar Council of India, p.349, (concerning legal aid). Note: A summary of this paper had

appeared in January 1975 issue of the *New York State Bar Journal*, (Vol.47, No.1), pp.966–67 under the caption "Obiter Dicta".

15. 'Law and Morals': Paper read in 1972 at the All India Bar Meet at Bombay.
16. 'Corporate Law: Is Reform Needed at the Core of Periphery?' (1973) *Journal of the Institute of All Indian Company Secretaries.*
17. 'The Constitution and the Concentration of Economic Power': Publication by the Indian Law Institute (1975) in the Proceedings of the Seminar held at Delhi on Constitutional Developments since Independence.
18. 'Structure and Legal Control of Public Enterprises': Paper contributed to the Colombo Colloquy held at the Legal Center, New York in 1973
19. 'The Structure and Legal Control over Multinational Corporations in a Mixed Economy': *The Indian Journal of International Law*, Vol. 15, Oct – Dec. 1975).
20. 'Centre-State Fiscal and Economic Relations: Base and Super-structure': Paper presented before the Commission on Centre-State Relations.
21. 'National Education Policy': Address delivered at National College, Trichy on 9.10.1986.
22. 'Justice: Judges and Lawyers: Judicial Inconsistency: Uncertainty in Law': Paper submitted on 28.6.1986 to the Bar Association of India, Bangalore Seminar.
23. 'Systems and Legal Control of Economic Phenomenon': Article written on 7.1.1977.
24. 'Law of Evidence': Article written for the book *The Indian Legal System.*
25. 'Management in Public and Private Sectors': Article submitted to Osmania University, Hyderabad, on 8.2.1980.
26. 'Non-consensual Transfer Under Article 222 After the Judges Case': Article published in the *Journal of the Bar Council of India*, Vol. IX, No.2, 1982.
27. 'Public Corporations in India—Their Structuring and Legal Control.'
28. 'Structure and Legal Control over Public Enterprises in India': Sulkhani Devi Memorial Lecture delivered in December 1974.
29. 'Philosophy of Competition and the Role of MRTP Commission': Dharwar University Extension Lectures.
30. 'On the Brandt Report': Three articles published in the *Economic Times* in May, 1981.
31. 'Social and Cultural System in Relation to Citizenship Development': Article contributed to the Citizenship Development Society, 1987.

'The Significance of Fifteenth August': *The Call Beyond*, August 1985; 'Sri Aurobindo and World Peace': *The Call Beyond*, August *1986*; 'Savitri and Sad vidya': *The Call Beyond*, April 1987; 'National Education Policy': *The Call Beyond*, July 1987; and 'Indian Concept of Citizenship': *The Call Beyond*, December 1987.

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